

THE TRANSNATIONAL ASPECTS OF HONG KONG INSOLVENCY LAW*

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I. INTRODUCTION

Many Asian countries, including the People's Republic of China ("China"), have been developing at an accelerated pace¹ and are playing an expanded role in world trade.² The Guangdong Province in Southern China has especially prospered and is intent on becoming Asia's fifth "Little Dragon" within the next twenty years.³

Hong Kong's role as a world financial market benefits from this growth, for Hong Kong is a major conduit by which Chinese enterprises, and Hong Kong enterprises investing in China, raise capital from local, Asian-Pacific, and other interests. For example, many Chinese companies are listing on the Hong Kong stock exchange, and it is not unusual for their initial public offerings to be hundreds of times oversubscribed.⁴ Similarly, some Hong Kong companies are "spinning

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1. For example, in 1993 the growth in Gross Domestic Product [GDP] of the following Asian countries outpaced the 2.2% growth in the industrial world: 13% in China; 5.4% in Hong Kong; 4.3% in India; 7% in Indonesia; 8.3% in Malaysia; 4.7% in South Korea; 6.1% in Taiwan; and 8% in Thailand. Bao Anyou with M. Raghu Ram, *A Year of the Dog Barking*, and accompanying *Economic Map for 1994*, ASIA, INC., Feb. 1994, at 40-45 (citing growth statistics supplied by Peregrine Brokerage Ltd.).

2. *Id.* at 40-43; *Southeast Asia's Miracle Makers Map*, ASIA, INC., Feb. 1994.

3. Simon Holberton, *Guangdong Seeks Electric Power in Bid to Surge Ahead*, S. CHINA MORNING POST, June 27, 1993 (Sunday Edition), at 2. The four Little Dragons are Hong Kong, South Korea, Singapore, and Taiwan.

4. Louise Lucas, *Denway Rush Leads to New-Issue Probe*, S. CHINA MORNING POST, Feb. 12, 1993 (Business Post), at 1 (shares in Denway Investment were more than 600 times oversub-

off" their China projects into separate companies that are independently listed in Hong Kong.⁵

Unprecedented amounts of foreign capital are flowing into the Hong Kong stock market as foreign investors seek to benefit from the economic expansion of both Hong Kong and China. In fact, for the nine months ending September 30, 1993, and before Barton Biggs's pronouncements sent the Hang Sang Index soaring,⁶ American investment companies bought a net of US\$3.72 billion worth of Hong Kong securities, far exceeding the US\$2.8 billion total for the whole of 1992.⁷ With this massive infusion of foreign capital the Hong Kong stock market, according to some estimates, has become the world's sixth largest capitalized market.⁸ The Hong Kong real estate market is also booming, with office rental rates now second only to those in Tokyo.⁹

However, hovering in the background of Hong Kong's prosperity is the planned resumption of Chinese sovereignty over Hong Kong in 1997. The recent stalemate between the United Kingdom and China regarding the extent to which Hong Kong should be allowed to democratize prior to 1997 has intensified concerns about Hong Kong's future. Other factors that exert influence over the Hong Kong economy are the political instability of China, the question of whether the United States will continue Most Favored Nation (MFN) status for China, and the resolution of China's application to join the General Agreement on Tariffs and Trade (GATT).

If foreign investors lose confidence in Hong Kong or if economic crises develop in China, foreign funds will very likely flow out of Hong

scribed; in China Travel Services, 411 times; in Hai Hong Holdings, 373 times; and in Guangzhou Investment, 320 times).

5. For example, Hopewell Holdings Ltd., a Hong Kong construction, real estate, and hotel group, recently spun off its electric-power projects in China and the Philippines into a new company called Consolidated Electric Power Asia, whose shares are separately listed in Hong Kong. *Hopewell Offers China Power Play*, INT'L HERALD TRIB., NOV. 24, 1993, at 9.

6. *US Rating Pushes Index to Record*, S. CHINA MORNING POST, OCT. 1, 1993 (News Section), at 1.

7. Simon Beck, *U.S. Investment in Hong Kong Shares Doubles*, S. CHINA MORNING POST, Jan. 12, 1994 (Business Post), at 1. The annual total for 1993 is expected to double the results for 1992. *Id.* United States net purchases of Hong Kong stocks were US\$273 million in 1984 and US\$557 million in 1990. *Id.*

8. BARING SECURITIES, PACIFIC RIM STOCK MARKET REVIEW (inside front cover) (Oct. 1993).

9. *High Rise in Office Rents*, INT'L HERALD TRIB., Jan. 26, 1994, at 15. Premium office rents rose 56.1% in 1993 and asking rents in Exchange Square (a prestigious Hong Kong business address) reached US\$12.69 per square foot per month). *Id.* The residential market has also spiraled. See, e.g., Richard Warren, *Price of Luxury Raised to \$10m*, S. CHINA MORNING POST, Jan. 26, 1994 (Property Post), at 1.

Kong as quickly as they came in,¹⁰ perhaps causing a crash in the Hong Kong stock and property markets and, in turn, the insolvency¹¹ of many Hong Kong companies and individuals. If these Hong Kong debtors have property abroad, the representatives of their estates¹² would most likely go abroad to claim the foreign assets and to seek recognition of, and assistance for, the Hong Kong insolvencies. Similarly, economic crises abroad could lead to the insolvency of foreign companies and individuals that have invested in Hong Kong. The representatives of their foreign estates would most likely come to Hong Kong to claim local assets and to gain recognition of, and assistance for, the foreign insolvencies. Either scenario would present significant transnational insolvency issues.

Part II of this article introduces two contrasting theoretical approaches for resolving questions of transnational insolvency law. Part III then briefly examines the options available under U.S. law to a foreign representative seeking to protect the assets of a foreign debtor in the United States and to obtain cross-border assistance from U.S. courts. This description of U.S. law is included for the purpose of drawing comparisons with Hong Kong law.

Part IV examines the options available under Hong Kong law to a foreign representative seeking to protect the assets of a foreign debtor

10. For example, the primary reason given for the slide in the Hang Seng Index during the week of Jan. 3-7, 1994, was the downgrading of Hong Kong and other regional markets by Nomura International (Hong Kong) Ltd. Simon Pritchard, *Insider Column*, S. CHINA MORNING POST, Jan. 9, 1994 (Sunday Money Section), at 2. See also *Billions Lost as Markets Dive*, S. CHINA MORNING POST, Jan. 14, 1994, at 1.

11. In Hong Kong, the term "bankruptcy" refers to bankruptcy proceedings involving individuals or partnerships under the Bankruptcy Ordinance, 1994, cap. 6, Laws of Hong Kong [hereinafter the H.K. Bankruptcy Ordinance]. The term "liquidation" refers to liquidation proceedings involving companies under the Companies Ordinance, 1994, cap. 32, Laws of Hong Kong [hereinafter the H.K. Companies Ordinance]. In Hong Kong a "liquidation" is also called a "winding up."

In contrast, in the United States, the term "bankruptcy" has a broader meaning and refers to a variety of insolvency proceedings under the United States Bankruptcy Code [hereinafter the U.S. Bankruptcy Code], including both liquidation and reorganization proceedings involving individuals, partnerships, or corporations. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in 11 U.S.C. (1994), in scattered sections of 28 U.S.C. (1994), and in scattered sections of other titles).

In this article, the term "bankruptcy" is used in its narrower, Hong Kong sense, and the term "insolvency" is used in the broader sense of including a variety of insolvency proceedings.

12. In the United States, the representative of an estate in a liquidation is called a "trustee," 11 U.S.C. §§ 701, 702 (1994), and in a reorganization is called either a "debtor in possession," *id.* §§ 1101(1), 1107, or a "trustee," *id.* § 1104. In Hong Kong, the representative of a bankrupt's estate is called the "trustee." H.K. Bankruptcy Ordinance § 23. Technically, there is no estate created in a liquidation in the Hong Kong. Therefore, the representative of a company and the creditors in a winding up is called a "liquidator." H.K. Companies Ordinance §§ 193, 194.

in Hong Kong and to obtain cross-border assistance from Hong Kong courts. This part first sets out the general principles about the application to Hong Kong of English legislation and English and Commonwealth case law and then discusses the Hong Kong and relevant English rules regarding the recognition of foreign insolvencies. Next discussed are the various options available to a foreign representative for gaining cross-border assistance, including non-insolvency options, the winding up and reorganization of companies under the Companies Ordinance (the "H.K. Companies Ordinance"),¹³ and the bankruptcy of individuals and partnerships under the Bankruptcy Ordinance (the "H.K. Bankruptcy Ordinance").¹⁴ Reference is made to applicable statutory provisions and relevant case law, as well as to some of the proposals made by the Law Reform Commission of Hong Kong Sub-Committee on Insolvency (the "Sub-Committee on Insolvency") in its recently published *Consultative Document on Bankruptcy*.¹⁵ In addition, comparisons are drawn with U.S. law where appropriate. The discussion in Part IV also highlights important omissions in the current statutory framework and includes recommendations for the enactment of comprehensive statutory guidelines regarding cross-border insolvency.

Part V discusses the ability of Hong Kong trustees and liquidators to seek cross-border assistance in transnational insolvencies and then turns to the treatment of Hong Kong insolvencies by courts in the United States and China. The discussion of the relevant U.S. case law also considers the criteria applied by one court in deciding to grant the relief requested by Hong Kong liquidators.

Part VI considers those proposals put forward in Hong Kong by the Sub-Committee on Insolvency in the *Consultative Document on Bankruptcy* that pertain to the transnational aspects of Hong Kong insolvency law or are relevant to the treatment of Hong Kong insolvencies by U.S. courts.

13. See *supra* note 11.

14. *Id.*

15. THE LAW REFORM COMMISSION OF HONG KONG SUB-COMMITTEE ON INSOLVENCY, CONSULTATIVE DOCUMENT ON BANKRUPTCY (1993) [hereinafter the CONSULTATIVE DOCUMENT ON BANKRUPTCY]. The Law Reform Commission of Hong Kong Sub-Committee on Insolvency [hereinafter the Sub-Committee on Insolvency] was formed to review Hong Kong's insolvency legislation and to propose reforms for enactment. After completing its review of the bankruptcy legislation, the sub-committee will consider corporate reorganizations, liquidations, and insolvency generally.

II. THE TWO PRIMARY APPROACHES FOR RESOLVING TRANSNATIONAL INSOLVENCY ISSUES¹⁶

There are two paradigmatic approaches for resolving transnational insolvency issues: the "universality" approach and the "territoriality" approach.¹⁷ Although these two approaches are not applied in their pure form by the courts of any country, they are useful in setting the boundaries for the debate about cross-border cooperation. The goal of the universality approach is the simplification and unification of transnational insolvency proceedings.¹⁸ Under this approach, a primary insolvency proceeding, which is intended to resolve all claims against the debtor's estate worldwide, occurs in the jurisdiction in which the debtor is domiciled or where the debtor's principal place of business is located. A trustee is appointed in this primary proceeding. To collect the worldwide assets of the debtor and seek the turnover of all such assets to the primary proceeding, the trustee travels abroad

16. Much of this section and the related footnotes is adopted from part II of Charles D. Booth, *A History of the Transnational Aspects of United States Bankruptcy Law Prior to the Bankruptcy Reform Act of 1978*, 9 B.U. INT'L L.J. 1, 4-5 (1991) [hereinafter *A History of the Transnational Aspects of U.S. Bankruptcy Law*].

17. See generally LOUIS JACQUES BLOM-COOPER, *BANKRUPTCY IN PRIVATE INTERNATIONAL LAW* 11-12, 14-17 (1954); IAN F. FLETCHER, *THE LAW OF INSOLVENCY* 542-43 (1990); JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS*, §§ 403-09, at 565-72 (8th ed. 1883); John D. Honsberger, *Conflict of Laws and the Bankruptcy Reform Act of 1978*, 30 CASE W. RES. L. REV. 631, 633-35 (1980); Timothy E. Powers & Rona R. Mears, *Protecting a Debtor's Assets in International Bankruptcy: A Survey and Proposal for Reciprocity*, 10 N.C.J. INT'L L. & COM. REG. 303, 305-07 (1985); Barbara K. Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153, 1154-55 (1985); Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 512-19 (1991) [hereinafter *Choice of Avoidance Law*].

In the text, I have merged two related, but distinct, issues in my use of the terms "universality" and "territoriality." To be more precise, these terms address the issue of what effect a declaration of insolvency in one country should have on property located elsewhere. BLOM-COOPER, *supra* note 17, at 14-17. A separate issue relates to jurisdiction in cross-border insolvency and is frequently discussed in terms of the "unity" of bankruptcy versus the "plurality" of bankruptcy. *Id.* at 14-15. Under the unity approach, only one insolvency case should be commenced in relation to a debtor and its law should be applied throughout the administration. *Id.* at 14. In contrast, under the plurality theory several bankruptcy cases may be commenced, each applying its own law. *Id.* at 15. One commentator has noted that although "universality" is distinct from "unity," "[t]he most comprehensive way to conceive of universality is the idea of 'unity' of bankruptcy." Hans Hanisch, *'Universality' versus Secondary Bankruptcy: A European Debate*, 2 INT'L INSOLVENCY REV. 151, 151-52 (1993). I agree with this interpretation and therefore incorporate many aspects of the "unity" approach into my discussion of the "universality" approach. However, the reader should bear in mind that the "universality" approach spans the gamut of cooperative behavior ranging from the more unity-based example described in the text above to a more plurality-based form in which a country applies its own substantive law (e.g., regarding priorities and the avoidance of local attachments) in a concurrent or ancillary insolvency before ordering the turnover of assets to the primary insolvency. See *id.* at 152.

18. See generally sources cited *supra* note 17.

and commences ancillary proceedings in each country in which assets of the debtor are located.

In each of these ancillary proceedings the court recognizes and gives effect to the declaration of insolvency in the primary proceeding, provides assistance to the trustee or foreign representative, applies the substantive insolvency law of the country in which the primary proceeding is occurring, and orders the turnover of all local assets to the primary proceeding. Because the final adjudication in the primary proceeding is respected by all jurisdictions, all creditors worldwide must submit claims in the primary proceeding or be forever barred from pursuing their claims.¹⁹

The primary advantage of the universality approach is equality of distribution among creditors worldwide, because all claims will be administered by the same court and under the same law. Moreover, since duplicative proceedings and litigation are avoided, distributions will most likely be higher than if each jurisdiction pursued independent, full-scale insolvency proceedings. Similarly, the administration of claims will certainly be more efficient. Of course, certain creditors who would have benefited from local priorities or preferences in their home countries are disadvantaged under the universality approach. Such creditors might suffer hardship, such as the inconvenience and the extra expense in being forced to participate in the primary proceeding where applicable procedural and substantive laws may differ from those of their home jurisdiction.²⁰

The contrasting territoriality approach stresses the inherent powers of a jurisdiction to adjudicate with respect to the *res* or property only within the borders of such jurisdiction. Under this approach, a trustee appointed in the original insolvency proceeding is limited to administering assets within his home jurisdiction. Courts in other jurisdictions do not recognize the original declaration of insolvency. Rather, each court adjudicates claims to the assets of the debtor that are located in its respective jurisdiction, often in a separate, full-scale insolvency proceeding. Creditors should file claims in the proceeding occurring in the relevant jurisdiction.²¹

The advantages of the territoriality approach are limited to local creditors who will benefit from local preferences and will not suffer the inconvenience and additional expense of being compelled to assert

19. Unger, *supra* note 17, at 1154; Honsberger, *supra* note 17, at 633. See generally STORY, *supra* note 17, §§ 403-09, at 565-72.

20. Unger, *supra* note 17, at 1154-55.

21. *Id.* at 1155.

their claims abroad under foreign law. The primary disadvantage of the territoriality approach is that it rejects the principle of equality of distribution to creditors worldwide, often in favor of a regime that rewards the fastest moving creditors. Of course, the multiplicity of insolvency proceedings will result in duplicative administrative expenses and correspondingly lower distributions and, therefore, in less efficient proceedings.²²

These two approaches serve as a helpful starting point from which to discuss the transnational aspects of the insolvency laws of the United States and of Hong Kong.

III. THE OPTIONS AVAILABLE TO A FOREIGN REPRESENTATIVE SEEKING TO PROTECT THE ASSETS OF A FOREIGN DEBTOR IN THE UNITED STATES AND TO OBTAIN CROSS-BORDER ASSISTANCE FROM UNITED STATES COURTS

Because the focus here is on the transnational aspects of Hong Kong insolvency law, a full discussion of the transnational aspects of U.S. bankruptcy law is outside the scope of this article.²³ However, a brief overview of the relevant provisions under U.S. law available to a foreign representative provides an interesting comparison with the procedures available under Hong Kong law.

Current United States Bankruptcy Code (the "U.S. Bankruptcy Code") provisions governing the recognition of foreign bankruptcies were enacted as part of the Bankruptcy Reform Act of 1978.²⁴ Under the U.S. Bankruptcy Code, a foreign representative²⁵ may pursue the

22. See *id.* at 1155. See also Honsberger, *supra* note 17, at 634-35.

23. For a detailed analysis of the options available to foreign representatives for protecting the assets of a foreign debtor in the United States, see generally Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135 (1992) [hereinafter *Recognition of Foreign Bankruptcies*]. See also Douglass G. Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729 (1987); L.F.E. Goldie, *The Challenge of Transnational Expectations and the Recognition of Foreign Bankruptcy Decrees—The United States Adjustment*, 58 BRIT. Y.B. INT'L L. 303 (1987); Stacy Allen Morales & Barbara Ann Deutch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573 (1984); Donald T. Trautman, *Foreign Creditors in American Bankruptcy Proceedings*, 29 HARV. INT'L L.J. 49 (1988); Unger, *supra* note 17.

24. See U.S. Bankruptcy Code, *supra* note 11.

25. Section 101(24) defines "foreign representative" as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." 11 U.S.C. § 101(24) (1994). Section 101(23) defines "foreign proceeding" as a "proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement

following options to protect the assets of a foreign debtor that are located in the United States: (1) filing a petition under Section 303(b)(4)²⁶ to commence an involuntary case against the debtor under Chapter 7 (liquidation) or Chapter 11 (reorganization); (2) filing a petition under Section 304 to commence a case ancillary to a foreign proceeding; or (3) seeking dismissal of a case or suspension of all proceedings under Section 305(a)(2).²⁷ Also, a foreign debtor may file a petition under Section 301 to commence a voluntary case under Chapter 7 or Chapter 11.²⁸

By filing a petition under Section 303(b)(4), a foreign representative commences an involuntary case against the foreign debtor under Chapter 7 or 11. The filing of a petition triggers an automatic stay against a broad variety of creditor actions against the debtor and the property of the estate.²⁹ After the court enters an order for relief under Chapter 7, a trustee is appointed³⁰ to marshal and distribute the assets of the estate. The trustee also exercises the avoidance powers under the U.S. Bankruptcy Code, perhaps the broadest of which are the strong arm power under Section 544(a)³¹ and the power to avoid preferential transfers.³² Although the estate created under Section

of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization." *Id.* § 101(23).

26. Section 303(b)(4) provides as follows: "An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title [11] by a foreign representative of the estate in a foreign proceeding concerning such person." *Id.* § 303(b)(4).

27. Section 305 provides as follows:

(a) The court, after notice and a hearing, may dismiss a case under this title [11], or may suspend all proceedings in a case under this title, at any time if—

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2) (A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

Id. § 305.

28. See *In re Florida Peach Corp. of America, Int'l.*, 63 B.R. 833 (Bankr. M.D. Fla. 1986); 11 U.S.C. § 301 (1994).

29. 11 U.S.C. § 362(a) (1994).

30. See *id.* §§ 701, 702.

31. *Id.* § 544(a).

32. *Id.* § 547. See also *id.* § 544(b) (trustee as successor to certain actual unsecured creditors); § 545 (statutory liens); § 546 (limitations on avoidance powers); § 548 (fraudulent transfers); § 549 (postpetition transfers).

541 is comprised of property "wherever located and by whomever held,"³³ it is unlikely, given the existence of the foreign insolvency, that a trustee would seek property abroad.

A Section 303(b)(4) case could proceed in a variety of ways, depending on the amount of cooperation between the U.S. court and the U.S. trustee, on the one hand, and the foreign court and the foreign representative, on the other. Under one scenario, there would be a full U.S. proceeding that would be on equal footing with the foreign proceeding. All U.S. assets would be administered and distributed in the U.S. proceeding. Alternatively, the U.S. trustee and the foreign representative could negotiate a scheme of arrangement for the worldwide distribution of assets.³⁴ Under another scenario, the primary aim of the U.S. proceeding would be to assist the foreign proceeding. The U.S. trustee, exercising her avoidance powers under U.S. law, would recover the foreign debtor's assets in the United States. Then, acting in close cooperation with the foreign representative, and after satisfying all priorities and secured claims under U.S. law, the U.S. trustee would move under Section 305 of the U.S. Bankruptcy Code to have the U.S. case suspended and the U.S. assets turned over to the foreign proceeding to be distributed abroad.³⁵

Instead of commencing an involuntary case under Chapter 7 or 11, a foreign representative may commence a case ancillary to the foreign proceeding under Section 304 of the U.S. Bankruptcy Code. Section 304 provides as follows:

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

33. *Id.* § 541(a).

34. This scenario (with either result) is analogous to what is called a "concurrent insolvency" under Hong Kong law. *See infra* notes 237-40 and accompanying text; PHILIP ST. J. SMART, CROSS-BORDER INSOLVENCY 213-21 (1991).

35. *See In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991) (discussed in text accompanying *infra* notes 340-80). This scenario is analogous to what is called an "ancillary winding up" under Hong Kong law. *See infra* notes 230-36 and accompanying text; SMART, *supra* note 34, at 233-52; *Re Irish Shipping Ltd.* [1985] H.K.L.R. 437.

- (ii) such property; or
- (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
- (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
- (3) order such other appropriate relief.
- (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—
 - (1) just treatment of all holders of claims against or interests in such estate;
 - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - (3) prevention of preferential or fraudulent dispositions of property of such estate;
 - (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
 - (5) comity; and
 - (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.³⁶

In a Section 304 case, a trustee is not appointed,³⁷ the automatic stay does not come into operation,³⁸ and an estate is not created.³⁹ Rather, the Section 304 case is usually limited to the *res* or property located in the United States, and the foreign representative may seek a variety of injunctive relief to protect such property from the actions of local creditors.⁴⁰ The foreign representative may also request the U.S. court to order the turnover of the foreign debtor's assets, or the proceeds of those assets, to the foreign representative to be administered in the foreign proceeding under foreign law⁴¹ or to order such other relief as may be appropriate.

36. 11 U.S.C. § 304 (1994).

37. *But see In re Lineas Aereas de Nicaragua, S.A.*, 13 B.R. 779, 780 (Bankr. S.D. Fla. 1981) [hereinafter *Lineas II*] (appointing a co-trustee regarding the debtor's assets in the United States).

38. *See* 11 U.S.C. § 362(a) (1994).

39. *See id.* § 541(a).

40. *See, e.g., In re Gercke*, 122 B.R. 621, 625 (Bankr. D.D.C. 1991); *In re Lines*, 81 B.R. 267, 268, 274 (Bankr. S.D.N.Y. 1988); *In re Culmer*, 25 B.R. 621, 634 (Bankr. S.D.N.Y. 1982).

41. *See, e.g., Culmer*, 25 B.R. at 634.

Under Section 304(b)(3), courts have authorized foreign representatives to operate the debtor's business in the United States,⁴² to conduct discovery,⁴³ and to seek relief from the automatic stay in a Chapter 11 case.⁴⁴ Also under Section 304(b)(3), courts have appointed a co-trustee⁴⁵ and have allowed a foreign court to interpret a contract under U.S. law.⁴⁶ In addition, the emerging view is that the avoidance law of the primary foreign proceeding is applicable under Section 304(b)(3) if that law is by its own terms applicable to the property in the United States.⁴⁷ Some commentators support a universality/unity approach pursuant to which, as a general rule, *all* substantive insolvency law to be applied in a Section 304 case—including, for example, the rules relating to the distribution of the debtor's estate and to the priorities among creditors—should be the applicable insolvency law of the country in which the primary insolvency occurs.⁴⁸

In deciding whether to order the relief requested by a foreign representative, the court must consider the factors listed in Section 304(c). These factors balance territoriality concerns against universality concerns and, in so doing, enable U.S. courts to assist foreign insolvencies, but only after ensuring that U.S. creditors have received certain minimum protection. The drafters of the legislation deliberately designed the guidelines to give U.S. courts "the maximum flexi-

42. *In re Lineas Aereas de Nicaragua S.A.*, 10 B.R. 790, 791 (Bankr. S.D. Fla. 1981).

43. *In re Gee*, 53 B.R. 891, 899, 905 (Bankr. S.D.N.Y. 1985).

44. *In re A. Tarricone, Inc.*, 80 B.R. 21 (Bankr. S.D.N.Y. 1987).

45. *Lineas II*, 13 B.R. at 780.

46. *Gercke*, 122 B.R. at 632-33.

47. See *In re Metzeler*, 78 B.R. 674 (Bankr. S.D.N.Y. 1987). For a discussion of this issue and the related case law, see Booth, *Recognition of Foreign Bankruptcies*, *supra* note 23, at 164-67. See also Westbrook, *Choice of Avoidance Law*, *supra* note 17, at 528-37 (supporting application of the avoidance law of the primary proceeding, but noting some difficulties in application that need to be addressed). But see *in re Comstat Consulting Servs.*, 10 B.R. 134, 135 (Bankr. S.D. Fla. 1981) (approving a consensual agreement to apply U.S. avoidance powers); *In re Egeria Societa per Azioni di Navigazione*, 26 B.R. 494, 497 (Bankr. E.D. Va. 1983), *rev'd on other grounds sub nom. Ciel y Cia S.A. v. Nereide Societa di Navigazione per Azioni*, 28 B.R. 378 (E.D. Va. 1983), *appeal dismissed sub nom. Ciel y Cia S.A. v. Commissioner of Egeria Societa di Navigazione per Azioni*, 723 F.2d 900 (4th Cir. 1983) (applying U.S. avoidance powers).

48. See Booth, *Recognition of Foreign Bankruptcies*, *supra* note 23, at 177-79, 189-90; Trautman, *supra* note 23, at 55-58; Brian J. Gallagher & John Hartje, *The Effectiveness of Section 304 in Achieving Efficient and Economic Equity in Transnational Insolvency*, 1983 ANN. SURV. BANKR. L. 1, 15, 19 (1983). Cf. Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 470-71 (1991) [hereinafter *Theory and Pragmatism in Global Insolvencies*] (claiming "it will not be possible to apply the home-country [primary proceeding's] law to all aspects of a company's insolvency. On the other hand, the enormous benefits of [universality] can be realized only if we apply the home-country law as often as possible."). See also *id.* at 462-64.

bility in handling ancillary cases."⁴⁹ Therefore, the courts have, not surprisingly, responded inconsistently in defining the level of protection that U.S. creditors should receive before a court orders cross-border assistance.

Two distinct approaches have emerged from these guidelines: the universality approach of cases such as *In re Culmer*⁵⁰ and the territoriality approach of cases such as *In re Toga Manufacturing Ltd.*⁵¹ A discussion of these two cases and the developing Section 304 case law lies outside the scope of this article. However, it should be noted that the case law demonstrates that although not always achieved in practice, Section 304 offers the potential for the development of a universality/unity approach.⁵²

Rather than seeking relief under the U.S. Bankruptcy Code, a foreign representative may seek assistance under state law. For instance, a foreign representative may attempt to recover movable assets that have not been attached by local creditors. Many states have long been receptive to such claims.⁵³ A foreign representative may also choose to vacate local attachments under state law by seeking the granting of comity.⁵⁴ Although assistance might be available under state law, seeking relief under Section 303(b)(4) or 304 of the U.S. Bankruptcy Code will generally be more advantageous to a foreign representative.

49. H.R. REP. NO. 595, 95th Cong., 1st Sess. 325, reprinted in 1978 U.S.C.C.A.N. 5963, 6281; S. REP. NO. 989, 95th Cong., 2d Sess. 35, reprinted in 1978 U.S.C.C.A.N. 5787, 5821.

50. 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

51. 28 B.R. 165 (Bankr. E.D. Mich. 1983).

52. For an analysis of the developing case law, see the articles listed *supra* note 23.

53. From early on, the generally adopted U.S. position was that the claims of foreign representatives would be upheld on the basis of comity when the interests of U.S. creditors were not adversely affected. See Booth, *A History of the Transnational Aspects of U.S. Bankruptcy Law*, *supra* note 16, at 9-11, 14, 19-22; John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 261-62 (1888); Kurt H. Nadelmann, *Codification of Conflicts Rules for Bankruptcy*, 30 ANN. SUISSE DR. INT. 57, 84-85 (1974) [hereinafter *Conflicts Rules for Bankruptcy*]; STORY, *supra* note 17, §§ 409-14, at 571-75. But see *In re Estate of Delehanty*, 11 Ariz. 366 (1908) (assistance not extended to a foreign representative asserting rights to real property).

54. See, e.g., *Cunard S.S. Co. v. Salen Reefer Servs.* AB, 773 F.2d 452 (2d Cir. 1985); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987).

IV. THE OPTIONS AVAILABLE TO A FOREIGN REPRESENTATIVE SEEKING TO PROTECT THE ASSETS OF A FOREIGN DEBTOR IN HONG KONG AND TO OBTAIN CROSS-BORDER ASSISTANCE FROM HONG KONG COURTS

A. Introduction

As Hong Kong is still a British colony, a few words are in order about the application to Hong Kong of English (or British or United Kingdom) legislation, as well as of English and Commonwealth case law. Section 2 of the Application of English Law Ordinance (the "H.K. Application of English Law Ordinance")⁵⁵ defines "Act" as meaning an enactment of the English Parliament, British Parliament, or United Kingdom Parliament, while Section 4 provides for the application in Hong Kong of prerogative legislation and Acts of Parliament.⁵⁶ Both the Parliament⁵⁷ and the Queen⁵⁸ have the power to legislate for Hong Kong. Their enactments take effect in Hong Kong by virtue of their own terms, either expressly or by implication.⁵⁹ An English statute that does not apply to Hong Kong by its own terms can also be made applicable to Hong Kong by an Order in Council or other prerogative legislation.⁶⁰ However, Great Britain rarely exercises this power to legislate for Hong Kong. The majority of legislation currently in force in Hong Kong has been enacted by the Hong Kong legislature, which is the Governor of Hong Kong "by and with the advice and consent of" the Legislative Council.⁶¹

55. Application of English Law Ordinance, 1994, cap. 88, Laws of Hong Kong [hereinafter the H.K. Application of English Law Ordinance].

56. PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 37 (2nd ed. 1993). For a more detailed analysis of the application of English law in Hong Kong, see Peter Wesley-Smith, *The Reception of English Law in Hong Kong*, 18 H.K.L.J. 183 (1988) [hereinafter *The Reception of English Law*].

57. Parliament is supreme in the British legal system and has the power to make any Act of Parliament apply to Hong Kong. Wesley-Smith, *The Reception of English Law*, *supra* note 56, at 197-98.

58. The Queen's power to legislate for Hong Kong is part of the "prerogative powers" derived from the traditional authority of the monarchy that has not been taken away by Parliament. Of course, as Britain is a constitutional monarchy, the power of the Queen to legislate for Hong Kong is exercised by the executive branch of the British government by Orders in Council. *See id.* at 198-99.

59. H.K. Application of English Law Ordinance § 4(1)(b)(ii). *See* WESLEY-SMITH, *supra* note 56, at 37; Wesley-Smith, *The Reception of English Law*, *supra* note 56, at 197-98.

60. H.K. Application of English Law Ordinance § 4(1)(b)(i). *See* WESLEY-SMITH, *supra* note 56, at 37; Wesley-Smith, *The Reception of English Law*, *supra* note 56, at 197-98.

61. Hong Kong Letters Patent ¶ VII(1), *reprinted in* PUBLIC LAW AND HUMAN RIGHTS—A HONG KONG SOURCEBOOK 20 (Andrew Byrnes & Johannes Chan eds. 1993) [hereinafter PUBLIC LAW AND HUMAN RIGHTS].

Locally enacted statutes are known as ordinances.⁶² The Hong Kong legislature can choose to apply an English law or statute to Hong Kong, either by placing it on the schedule to the H.K. Application of English Law Ordinance⁶³ or by applying it through another locally enacted ordinance.⁶⁴ The Hong Kong legislature often models Hong Kong legislation after English Acts. As a result, many local ordinances are very similar to either existing or former English legislation. The current H.K. Bankruptcy Ordinance is a good example of this practice. Although revised over the years, much of the H.K. Bankruptcy Ordinance dates from the Hong Kong Bankruptcy Ordinance (cap. 6) 1931, which, in turn, was based on the United Kingdom Bankruptcy Act 1914.⁶⁵ In the United Kingdom, the Insolvency Act 1985⁶⁶ and the Insolvency Act 1986 (the "U.K. Insolvency Act 1986")⁶⁷ replaced the 1914 Act. The Sub-Committee on Insolvency has recently proposed that many provisions in the U.K. Insolvency Act 1986 should be incorporated into the H.K. Bankruptcy Ordinance.

Hong Kong corporate insolvency legislation is also based on old English law. Much of the current H.K. Companies Ordinance dates from its original enactment in Hong Kong in the Companies Ordinance (cap. 32) 1932, which, in turn, was based on the United Kingdom Companies Act 1929.⁶⁸ Major amendments to Hong Kong companies law were made in 1984, many of which were based on the

62. However, Britain retains ultimate power in that all locally enacted legislation is subject to the Queen's power of "disallowance," WESLEY SMITH, *supra* note 56, at 39-40, and can also be over-ridden at any time by an Act of Parliament.

63. H.K. Application of English Law Ordinance § 4(1)(a) (for pre-1843 Acts only). See WESLEY-SMITH, *supra* note 56, at 37; Wesley-Smith, *The Reception of English Law*, *supra* note 56, at 198.

64. H.K. Application of English Law Ordinance § 4(1)(b)(iii). See WESLEY-SMITH, *supra* note 56, at 37; Wesley-Smith, *The Reception of English Law*, *supra* note 56, at 198.

65. United Kingdom Bankruptcy Act, 1914, 4 & 5 Geo. 5, ch. 59 [hereinafter the U.K. Bankruptcy Act 1914] (primarily applicable to England and Wales).

66. United Kingdom Insolvency Act, 1985, ch. 65 [hereinafter the U.K. Insolvency Act 1985] (most sections were repealed in 1986) (the corporate insolvency provisions are primarily applicable to England, Wales, and Scotland and the bankruptcy provisions are primarily applicable to England and Wales).

67. United Kingdom Insolvency Act, 1986, ch. 45 [hereinafter the U.K. Insolvency Act 1986] (the corporate insolvency provisions are primarily applicable to England, Wales, and Scotland and the bankruptcy provisions are primarily applicable to England and Wales).

68. United Kingdom Companies Act, 1929, 19 & 20 Geo. 5, ch. 23 (primarily applicable to England, Wales, and Scotland).

United Kingdom Companies Act 1948.⁶⁹ Little change, however, was made to the liquidation provisions.

In terms of decisional law, the only English court that, strictly speaking, binds Hong Kong courts is the Judicial Committee of the Privy Council, which hears appeals from the Hong Kong Court of Appeal.⁷⁰ In practice, however, the Hong Kong courts consider themselves bound by any House of Lords decision that involves a matter of common law or English law.⁷¹ Moreover, interpretations by the House of Lords of English statutory provisions that are very similar to applicable Hong Kong provisions "are in effect binding" on the Hong Kong courts.⁷² Although not binding on the Hong Kong courts, relevant statutory interpretations by the English Court of Appeal are also likely to be followed.⁷³ In addition, relevant statutory interpretations by the courts in other Commonwealth countries are often considered persuasive authority.⁷⁴

Hong Kong courts also generally follow the decisions of the English Court of Appeal or High Court in common law matters.⁷⁵ Section 3(1) of the H.K. Application of English Law Ordinance specifically provides for the application in Hong Kong of English common law and the rules of equity. Section 3(1) provides that the common law and the rules of equity shall be in force in Hong Kong only "so far as they are applicable to the circumstances of Hong Kong or its inhabitants[,] subject to such modifications as such circumstances may re-

69. United Kingdom Companies Act, 1948, 11 & 12 Geo. 6, ch. 38 (primarily applicable to England, Wales, and Scotland). E.L.G. Tyler, *Uncorking Hong Kong's Insolvency Law*, Sept. 18, 1989, at 2 (unpublished paper presented at Eleventh Law Asia Conference). This led one commentator to note that "the 1984 [Hong Kong] Companies (Amendment) Ordinance was a great leap forward to 1948." *Id.*

70. WESLEY-SMITH, *supra* note 56, at 72. For a more detailed discussion of the effect of English judicial decisions on the courts of Hong Kong, see *de Lasala v. de Lasala* [1980] A.C. 546 P.C. H.K., and Peter Wesley-Smith, *The Effect of 'De Lasala' in Hong Kong*, 28 MALAYA L.R. 50 (1986).

71. WESLEY-SMITH, *supra* note 56, at 72; Wesley-Smith, *The Reception of English Law*, *supra* note 56, at 215; Wesley-Smith, *The Effect of 'De Lasala' in Hong Kong*, *supra* note 70, at 55-57.

72. WESLEY-SMITH, *supra* note 56, at 72-73. See also Wesley-Smith, *The Effect of 'De Lasala' in Hong Kong*, *supra* note 70, at 54-56.

73. Wesley-Smith, *The Effect of 'De Lasala' in Hong Kong*, *supra* note 70, at 52-53 (regarding the English Court of Appeal).

74. Article 84 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China [hereinafter the Basic Law] provides for the continuation of this practice post-1997 by providing that the courts "may refer to precedents of other common law jurisdictions." Basic Law, ch. 4, § 4, art. 84, *reprinted in* PUBLIC LAW AND HUMAN RIGHTS, *supra* note 61, at 99.

75. WESLEY-SMITH, *supra* note 56, at 73. See also *id.* at 34-37.

quire.”⁷⁶ However, Hong Kong courts have adopted a “strict test” and apply English common law unless to do so “would cause injustice or oppression.”⁷⁷

Furthermore, consideration must be given to the changes that will be made to the Hong Kong legal system after 1997. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (the “Sino-British Joint Declaration”), which came into force in 1985, provides that from July 1, 1997, Hong Kong will become a Special Administrative Region (the “Hong Kong SAR”) directly under the authority of the Central People's Government of China.⁷⁸ For fifty years after the transfer of Hong Kong's sovereignty to China, the Hong Kong SAR is to “enjoy a high degree of autonomy.”⁷⁹ More particularly, the Sino-British Joint Declaration provides that “[t]he laws currently in force in Hong Kong will remain basically unchanged.”⁸⁰ This latter provision was incorporated into Article 8 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the “Basic Law”), which will become the constitution of the Hong Kong SAR on July 1, 1997. Article 8 provides that the laws in force in Hong Kong prior to the transfer, excluding those made in the United Kingdom, but including the common law and the rules of equity, shall be maintained unless they contravene the Basic Law, and shall be subject to amendment by the Hong Kong SAR legislature.⁸¹

76. H.K. Application of English Law Ordinance § 3(1)(a)-(b). Section 3(1)(c), in turn, provides that the application of the common law and the rules of equity are subject to amendment by imperial or Hong Kong legislation.

77. WESLEY-SMITH, *supra* note 56, at 36.

78. The Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong ¶¶ 1-3(2) [hereinafter the Sino-British Joint Declaration], *reprinted in* PUBLIC LAW AND HUMAN RIGHTS, *supra* note 61, at 45.

79. Sino-British Joint Declaration ¶¶ 3(2) & (12), *reprinted in* PUBLIC LAW AND HUMAN RIGHTS, *supra* note 61, at 45, 47.

80. Sino-British Joint Declaration ¶ 3(3), *reprinted in* PUBLIC LAW AND HUMAN RIGHTS, *supra* note 61, at 46.

81. Basic Law, ch. 1, art. 8, *reprinted in* PUBLIC LAW AND HUMAN RIGHTS, *supra* note 61, at 85. See WESLEY-SMITH, *supra* note 56, at 8-9.

B. Recognition of Foreign Insolvencies

Under Hong Kong law there is no statutory provision that governs the recognition of foreign insolvencies.⁸² Thus, neither the H.K. Bankruptcy Ordinance nor the H.K. Companies Ordinance contains a definition of "foreign proceeding," to set forth a necessary connection between the foreign debtor and the foreign jurisdiction, or of "foreign representative." Nor are there statutory enactments similar to Sections 303, 304, and 305 of the U.S. Bankruptcy Code that set forth procedures for foreign representatives to obtain recognition of foreign insolvencies and to seek a variety of relief. Rather, Hong Kong relies on a common law approach. Because the Hong Kong courts have decided few transnational insolvency cases, reference below is made to many English cases and to commentators on English law.

Hong Kong law, unlike U.S. law, draws a distinction between the recognition of foreign bankruptcies and the recognition of foreign liquidations. Foreign bankruptcies are recognized under Hong Kong law

82. However, prior to its repeal in 1985, § 122 of the U.K. Bankruptcy Act 1914 provided for cooperation among bankruptcy courts throughout the Commonwealth. Section 122 provided as follows:

The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

Section 122 made it easier for trustees from Commonwealth jurisdictions to gain recognition from, and cooperation of, bankruptcy courts in other Commonwealth jurisdictions.

Re Estate of Aw Hoe [1957] H.K.L.R. 401 is the only reported Hong Kong case involving the application of § 122. In this case, the Official Assignee of the then Colony of Singapore requested the Hong Kong Supreme Court to give effect to an order of the Singapore High Court that had vested the property in Hong Kong of a deceased Singaporean bankrupt in the Official Assignee. The Hong Kong court acknowledged that the Official Assignee had good title to the property in Hong Kong. [1957] H.K.L.R. at 404. However, the Hong Kong court found that it had no jurisdiction to make such an order because the Singapore High Court had failed to submit to the Hong Kong court an order seeking aid as required under § 122. *Id.* Two months later, upon receipt of both the appropriate order from the Singapore court and a Letter of Request issued pursuant to the order, the Hong Kong court ordered the relief requested by the Official Assignee. *Re Estate of Aw Hoe* [1957] H.K.L.R. 539.

Section 122 of the U.K. Bankruptcy Act 1914 was repealed by the U.K. Insolvency Act 1985 and replaced by § 213(3), (4), (9)(d), & (10) of the 1985 legislation, which, in turn, was repealed by the U.K. Insolvency Act 1986 and re-enacted with some minor changes as § 426(4), (5), (10)(d), & (11) of the 1986 legislation. Since Hong Kong never enacted § 122 or a replacement provision into Hong Kong law, at present there is no statutory provision in the H.K. Bankruptcy Ordinance applicable to granting assistance to foreign representatives. See MUIR HUNTER & JOHN BRIGGS, *MUIR HUNTER ON PERSONAL INSOLVENCY*, ¶ 3-481/3 at 3268 (2/1991).

when (1) declared by a court in the jurisdiction in which the debtor was domiciled at the commencement of the bankruptcy⁸³ or (2) the debtor submits to the jurisdiction of the foreign court.⁸⁴ Some English authorities support the proposition that a foreign bankruptcy should also be recognized when the debtor carries on business within the jurisdiction of the foreign court.⁸⁵

For cases involving the recognition of a foreign liquidation, the general rule is that Hong Kong courts will recognize a foreign liquidation that is granted under the law of the place of the company's incorporation.⁸⁶ However, other grounds exist upon which recognition may be based,⁸⁷ including (1) that the debtor carries on business

83. *Modern Terminals (Berth 5) Ltd. v. States S.S. Co.* [1979] H.K.L.R. 512, 513 [hereinafter *Modern Terminals*] (citing the English case, *Re Blithman* (1866) L.R. 2 Eq. 23). See also the following commentators, all of whom discuss English law and also cite *Re Blithman*: P.M. NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 913 (12th ed., 1992) [hereinafter *CHESHIRE AND NORTH*]; 2 DICEY AND MORRIS ON THE CONFLICT OF LAWS, Rule 167(2)(a) and accompanying cmt., at 1172-74 (12th ed., 1993) [hereinafter 2 DICEY AND MORRIS]; FLETCHER, *supra* note 17, at 574; SMART, *supra* note 34, at 83; J.W. Woloniecki, *Cooperation Between National Courts in International Insolvencies: Recent United Kingdom Legislation*, 35 INT'L & COMP. L.Q. 644, 656 (1986). See also SMART, *supra* note 34, at 83-84 (arguing that English courts should recognize a foreign bankruptcy that is recognized as effective in the jurisdiction in which the debtor was domiciled when the bankruptcy was commenced).

84. *Modern Terminals* [1979] H.K.L.R. at 513 (citing the English case, *Re Anderson* (1911) 1 K.B. 896). See also *CHESHIRE AND NORTH*, *supra* note 83, at 913-14; 2 DICEY AND MORRIS, *supra* note 83, Rule 167(2)(b) and accompanying cmt., at 1172-74; FLETCHER, *supra* note 17, at 574; SMART, *supra* note 34, at 85-86; Woloniecki, *supra* note 83, at 656.

85. FLETCHER, *supra* note 17, at 574; SMART, *supra* note 34, at 86-92. See also 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 167, at 1174. Some commentators propose that a foreign bankruptcy should also be recognized on the basis of the residence of the bankrupt within the jurisdiction of the foreign court. FLETCHER, *supra* note 17, at 574. SMART, *supra* note 34, at 95-96. See also 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 167, at 1174. It is unlikely that the mere presence of assets within the foreign country would be a sufficient basis for recognition. *Id.* But see *CHESHIRE AND NORTH*, *supra* note 83, at 913 (suggesting that possession of assets by the debtor in the country of bankruptcy adjudication might be sufficient). Lastly, Fletcher also proposes that:

we ought to acknowledge the validity of any foreign adjudication based upon the exercise of a ground of jurisdiction which is utilised by English law itself, and indeed it would be reasonable to go further and assert that a foreign adjudication should be recognised where it is pronounced by the courts of a country with which the debtor is genuinely and substantially connected.

FLETCHER, *supra* note 17, at 574.

86. See *Re Irish Shipping* [1985] H.K.L.R. 437, 439; 2 DICEY AND MORRIS, *supra* note 83, Rule 160 and accompanying cmt., at 1137-39; FLETCHER, *supra* note 17, at 609; SMART, *supra* note 34, at 102-03; Woloniecki, *supra* note 83, at 647. Some commentators propose that recognition should also be granted where a foreign liquidation is recognized under the law of the place of the company's incorporation. FLETCHER, *supra* note 17, at 609-10; SMART, *supra* note 34, at 103-04.

87. But see Woloniecki, *supra* note 83, at 656 (asserting that "[i]t is not clear whether the English court will recognise the jurisdiction of a foreign court to wind up a company in any case where the company is not incorporated under the law of that court").

within the jurisdiction of the foreign court⁸⁸ or (2) that the debtor submits to the insolvency jurisdiction of the foreign court.⁸⁹

Another possible exception to the general rule for recognizing foreign liquidations arises in cases where there is no likelihood of a liquidation occurring in the jurisdiction in which a company is incorporated.⁹⁰ This issue arose in the Hong Kong case of *Re Russo-Asiatic Bank*.⁹¹ The Russo-Asiatic Bank was incorporated in Russia and had branches, *inter alia*, in London, Shanghai, and Hong Kong. After the Russian Revolution, the Hong Kong branch of the Russian company was liquidated.⁹² All creditors in Hong Kong were paid in full and a surplus from the liquidation remained in the hands of the Hong Kong liquidator.⁹³ Liquidations of other branches of the Russian company occurred in London and Shanghai. The Shanghai liquidator, asserting that the Russo-Asiatic Bank had been dissolved by the Soviet government, sought the surplus in the hands of the Hong Kong liquidator. The London liquidator sought to represent the London creditors in the Hong Kong proceedings.

The Hong Kong court followed the earlier approach of the English House of Lords and held that the Russian bank had not been dissolved by the revolutionary Soviet legislation.⁹⁴ In the absence of a liquidation in the place of incorporation to which the Hong Kong proceedings could be ancillary, the court found that no other court could "be regarded as the principal Court to govern the liquidation."⁹⁵ The Hong Kong court, therefore, ruled against the Shanghai liquidator. However, the Hong Kong court did recognize the London liquidator for the purpose of submitting claims on behalf of the London creditors.⁹⁶

Inasmuch as Hong Kong law draws a distinction between the bankruptcy of individuals and the liquidation of companies, an issue sometimes arises whether a Hong Kong court should apply the rules regarding the recognition of foreign bankruptcies or the rules regard-

88. SMART, *supra* note 34, at 107-08 (but noting that there might be limits to the consequences of such recognition); 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 160, at 1138.

89. SMART, *supra* note 34, at 108-09.

90. 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 160, at 1138-39; SMART, *supra* note 34, at 106-07.

91. (1930) 24 H.K.L.R. 16, *appeal dismissed*, (1930) 24 H.K.L.R. 100.

92. *Id.* at 17.

93. *Id.*

94. *Id.* at 18-19 (citing *Russian Commercial and Industrial Bank v. Comptoir D'Escompte de Mulhouse* (1925) A.C. 112).

95. *Id.* at 20 (citing *In re English, Scottish & Australian Bank* (1893) 3 Ch. 394).

96. *Id.* at 20-21. For further discussion of this case, see SMART, *supra* note 34, at 106-07.

ing the recognition of foreign liquidations. This issue has arisen in the context of whether to recognize the rehabilitation of a foreign company. However, the issue would not arise under the U.S. Bankruptcy Code, which provides the same legislative scheme for the insolvency both of individuals and of companies. Thus, under U.S. law the definition of "foreign proceeding"⁹⁷ includes criteria relevant to the recognition both of foreign bankruptcies and of foreign liquidations. Similarly, the definition of "foreign representative"⁹⁸ is broadly drafted and extends both to a trustee appointed in a foreign bankruptcy and to a liquidator appointed in a foreign winding up.

In the Hong Kong case of *Modern Terminals (Berth 5) Ltd. v. States Steamship Co. ("Modern Terminals")*,⁹⁹ the plaintiff, a Hong Kong company, sought summary judgment against a U.S. company undergoing rehabilitation under Chapter XI of the United States Bankruptcy Act of 1898 (the "U.S. Bankruptcy Act").¹⁰⁰ The defendant, the debtor in possession,¹⁰¹ sought a stay of the proceedings on the ground that it had obtained protection under U.S. bankruptcy law. The Hong Kong court reviewed the authority supporting the principle that recognition should be granted to a foreign adjudication in bankruptcy that "purports to control the property of a bankrupt wherever situated as vesting the bankrupt's movable property in Hong Kong or elsewhere in the trustee or other representative of his creditors if the bankrupt was domiciled in that other country or invoked or submitted to its jurisdiction."¹⁰² The Hong Kong court noted that the U.S. Bankruptcy Act dealt with corporate liquidations, which would be dealt with in Hong Kong under the H.K. Companies Ordinance,¹⁰³ but the court nevertheless relied exclusively on bankruptcy rather than companies law precedent in deciding whether to recognize the U.S. rehabilitation proceedings. In so doing, the court focused on the capacity in which the debtor retained possession of its property and held that:

97. See *supra* note 25.

98. *Id.*

99. [1979] H.K.L.R. 512.

100. *Id.* at 513. United States Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978).

101. Under § 342 of Chapter XI, where no receiver or trustee was appointed, the debtor continued in possession of its property. Similarly, under § 1101(1) of the U.S. Bankruptcy Code, where no trustee is appointed, the debtor becomes a "debtor in possession." 11 U.S.C. § 1101(1) (1994).

102. *Modern Terminals* [1979] H.K.L.R. at 513 (citing *Re Blithman* (1866) L.R. 2 Eq. 23 and *Re Anderson* (1911) 1 K.B. 896).

103. *Id.* at 514.

the property of the defendant is vested in it as if it were a trustee in bankruptcy and that such property wherever situate is under the control of the bankruptcy court in California and that the court in Hong Kong should respect that jurisdiction so far as movable property here is concerned.¹⁰⁴

Thus, the *Modern Terminals* court determined that because the U.S. debtor in possession held the company's assets on trust for the benefit of its creditors, rather than holding them as a beneficial owner, recognition should be granted to the U.S. proceedings.¹⁰⁵ This interpretation of U.S. law was antithetical to the approach taken in another Hong Kong case, *Mobil Sales and Supply Corporation v. Owners of 'Pacific Bear'* ("*Mobil Sales and Supply*"),¹⁰⁶ in which the court found that a debtor in possession was the beneficial owner of the company's assets.¹⁰⁷

The English case of *Felixstowe Dock and Railway Co. v. United States Lines Inc.* ("*Felixstowe Dock*")¹⁰⁸ offers a contrasting approach to the *Modern Terminals* approach of applying the rules regarding the recognition of foreign bankruptcies. The defendant in *Felixstowe Dock* was a company in the process of reorganization under Chapter 11 of the U.S. Bankruptcy Code. Although the English court concluded that a debtor in possession remains the beneficial owner of the company's assets,¹⁰⁹ the court handled the case as one involving the recognition of a foreign liquidation.¹¹⁰ The approach by the court in *Felixstowe Dock* is preferable to the one in *Modern Terminals*. As Philip Smart has noted, "[t]he vesting or otherwise of property by virtue of foreign proceedings does not determine the choice between bankruptcy and liquidation."¹¹¹ Rather, the focus of the court should be on the extent to which the foreign law confers a separate legal personality on the entity that is the subject of foreign insolvency proceedings.¹¹²

104. *Id.* at 521. See also *id.* at 516-20.

105. *Id.* at 521, 524-25.

106. [1979] H.K.L.R. 125 [hereinafter *Mobil Sales and Supply*].

107. *Id.* at 133. However, in *Mobil Sales and Supply* this finding was not made in the context of applying rules regarding the recognition of foreign bankruptcies, but rather in the context of exercising the admiralty jurisdiction of the Hong Kong court. *Id.* at 127-32.

108. [1989] Q.B. 360 [hereinafter *Felixstowe Dock*].

109. *Id.* at 364-65 (relying on the U.S. Supreme Court case of *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984)).

110. SMART, *supra* note 34, at 114. See *Felixstowe Dock* Q.B. at 376-7.

111. SMART, *supra* note 34, at 114.

112. *Id.* at 115.

Lastly, although a foreign debtor fulfills the above criteria for the recognition of a foreign bankruptcy or liquidation, recognition may nevertheless be barred. A Hong Kong court may refuse to grant recognition (1) where the recognition of the foreign insolvency would be contrary to Hong Kong public policy,¹¹³ (2) where the foreign insolvency decree has been made as a result of fraud or in breach of the rules of natural justice,¹¹⁴ or (3) where the foreign insolvency proceedings are an attempt to enforce a foreign penal or revenue law.¹¹⁵

A serious weakness of current Hong Kong statutory law is its silence about the recognition of foreign insolvencies. Statutory guidelines should be enacted to replace the predominantly common law approach. This is especially important given the approach of 1997. A first step would be to incorporate definitions of "foreign representative" and "foreign proceeding" into the relevant ordinances. These definitions should resolve the issue of whether the courts should apply the rules regarding the recognition of foreign bankruptcies or the rules regarding the recognition of foreign liquidations. The definition of "foreign proceeding" should also explicitly state whether a debtor's carrying on of business, a debtor's residence, or the presence of a debtor's assets would each be a sufficient connection between a foreign debtor and the foreign jurisdiction in which the debtor's bankruptcy occurs to justify the granting of recognition by Hong Kong courts to a foreign bankruptcy. Similarly, the criteria setting forth the required connection for foreign liquidations should also be made explicit. Lastly, provisions regarding the recognition of Chinese insolvencies should be enacted.

113. *Id.* at 117-118; Woloniecki, *supra* note 83, at 659.

114. SMART, *supra* note 34, at 118-123. Compare Woloniecki, *supra* note 83, at 659 (claiming that these exceptions are examples of situations that would be contrary to English public policy).

115. SMART, *supra* note 34, at 125-131. Compare Woloniecki, *supra* note 83, at 659-60 (claiming that these exceptions are also examples of situations that would be contrary to English public policy). In cases involving the enforcement of foreign revenue laws, it is generally accepted that this exception to recognition should apply only where the sole object of the foreign proceedings is to enforce foreign revenue laws. See SMART, *supra* note 34, at 125-31; Woloniecki, *supra* note 83, at 659-60.

C. *The Options Available to a Foreign Representative Seeking to Protect the Assets of a Foreign Debtor in Hong Kong and to Obtain Cross-Border Assistance from Hong Kong Courts*

1. Non-Insolvency Options

Under Hong Kong law, the issue of whether a foreign insolvency should be recognized is distinct from the issue of what types of assistance may be forthcoming once recognition is granted.¹¹⁶ The question then arises of what options a foreign representative may pursue to protect the assets of a foreign debtor in Hong Kong and to secure cross-border assistance from the Hong Kong courts. At the outset, it should be noted that the Hong Kong courts have the inherent jurisdiction to assist a foreign representative from any jurisdiction.¹¹⁷

As long ago as 1764, in *Solomons v. Ross*¹¹⁸ an English court held that trustees appointed in a foreign bankruptcy proceeding were entitled to collect property in England even though an English creditor had begun (but had not completed) efforts to attach the debt. This case is the foundation for the claim of leading English commentators that "[t]he English courts have consistently applied the doctrine of *universality*, according to which they hold that all *movable* property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee."¹¹⁹ However, in 1910 in the English case of *Galbraith v. Grimshaw*,¹²⁰ the House of Lords overruled *Solomons v. Ross* to the extent that an attachment (though un-

116. SMART, *supra* note 34, at 79, 135.

117. See *id.* at 259. See also the English case, *Re Kooperman* [1928] W.N. 101 (discussed in *id.* at 98). In addition, prior to its repeal in 1985, § 122 of the U.K. Bankruptcy Act 1914 provided statutory authorization for granting assistance to bankruptcy trustees from Commonwealth jurisdictions. See *supra* note 82.

118. (1764) 1 H. Bl. 131n., also reported (1764) Wallis 59n. For a discussion of this case, see Kurt H. Nadelmann, *Solomons v. Ross and International Bankruptcy Law*, 9 MOD. L. REV. 154 (1946) [hereinafter *Solomons v. Ross*].

119. CHESHIRE AND NORTH, *supra* note 83, at 912. But see Nadelmann, *Solomons v. Ross*, *supra* note 118. Nadelmann stresses that the English court allowed the Dutch trustees in *Solomons v. Ross* to take the property only after it had been shown that the English creditor would be allowed to share equally in the Dutch bankruptcy. *Id.* at 161-62. He claims that "[o]ne may wonder whether the theory of universality is part of English law. This theory is not needed to explain *Solomons v. Ross* . . ." *Id.* at 163. Nadelmann concludes that whether a foreign trustee is entitled to collect local assets in England is a matter of discretion. *Id.*

From early on, the courts in the United States refused to follow *Solomons v. Ross* to the extent that the attachments of U.S. creditors were involved. Kurt H. Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 HARV. L. REV. 1025, 1047 (1946); STORY, *supra* note 17, §§ 409-14, at 571-75.

120. [1910] A.C. 508.

completed) is obtained prior to the date of the foreign bankruptcy order.¹²¹

Galbraith v. Grimshaw is still applicable in Hong Kong today.¹²² The making of a foreign order vesting title in a foreign trustee operates to vest in the foreign trustee movable property in Hong Kong not subject to prior attachment—provided the foreign law extends to movable property in Hong Kong.¹²³ Since the “vesting is ‘consequential and instantaneous’ upon the making of the foreign order, no confirmation or execution by the [Hong Kong] court is required.”¹²⁴ Thus, a foreign trustee in Hong Kong is entitled to claim a foreign debtor’s movable, but not immovable, property that is not subject to any pre-existing attachment, execution, or valid charge.¹²⁵ The same

121. Nadelmann, *Conflicts Rules for Bankruptcy*, *supra* note 53, at 83. Compare SMART, *supra* note 34, at 157, 158 n.1 (noting that although the court in *Galbraith v. Grimshaw* declined to follow *Solomons v. Ross*, it is not clear from the report of *Solomons v. Ross* at (1764) Wallis 59n. whether the attachment in England was made prior to the commencement of the Dutch bankruptcy).

In *Galbraith v. Grimshaw*, a Scottish trustee sought property in England that had previously been garnished. The garnishment was void under Scottish bankruptcy law and could have been voided under English bankruptcy law had a bankruptcy later occurred in England. Nadelmann, *Conflicts Rules for Bankruptcy*, *supra* note 53, at 83-84.

122. See *Modern Terminals* [1979] H.K.L.R. at 517, 523, 525.

123. *Id.* at 521, 525. See 2 DICEY AND MORRIS, *supra* note 83, Rule 169 & accompanying cmt., at 1175-77; SMART, *supra* note 34, at 140.

124. SMART, *supra* note 34, at 140 (quoting *Neale v. Cottingham* (1770) Wallis 54, 75 *per* Lord Lifford). However, a foreign representative may request the Hong Kong court to give effect to the foreign vesting order. See *Re Estate of Aw Hoe* [1957] H.K.L.R. 401, discussed in *supra* note 82. Also, if a foreign trustee’s actions are contested by a local creditor, the Hong Kong court may deny recognition to the foreign bankruptcy if one of the earlier noted bars to recognition is found to exist. See *supra* notes 113-15 and accompanying text. See also Nadelmann, *Solomons v. Ross*, *supra* note 118, at 161-63 (viewing the decision in *Solomons v. Ross* as one in which the court was exercising its discretion); CHESHIRE AND NORTH, *supra* note 83, at 913.

From early on, the U.S. approach was generally that the title of foreign assignees was effective for the purpose of allowing the assignees to commence suits in U.S. courts. STORY, *supra* note 17, § 420, at 579-80. However, in the context of resolving disputes between the rights of foreign assignees and those of attaching U.S. creditors (but not in relation to the bankrupt himself) the U.S. position was that “the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.” *Id.* § 421 at 580 (quoting *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289, 302 (1809)). See also Lowell, *supra* note 53, at 260-61. In such cases, the conflict was resolved on the basis of principles of comity. See *supra* note 53.

125. See 2 DICEY AND MORRIS, *supra* note 83, Rules 169, 170 & accompanying cmts., at 1175-79; SMART, *supra* note 34, at 140, 147-48; Woloniecki, *supra* note 83, at 657-58. See also CHESHIRE AND NORTH, *supra* note 83, at 912. The foreign trustee’s title may also extend to after-acquired property in Hong Kong. See SMART, *supra* note 34, at 141-45.

One should not overemphasize the distinction between the English/Hong Kong universality approach to movables and the U.S. (at times territoriality-based) comity approach. For example, both approaches would uphold a pre-existing attachment over the later claim of a foreign assignee. However, a difference between the English/Hong Kong approach and the U.S. approach

is true in the case of a foreign liquidator vested under foreign law with title to the company's assets.¹²⁶

Although title usually does not vest in a foreign liquidator, under Hong Kong law a foreign liquidator would most likely be allowed to represent the foreign corporation in Hong Kong and deal with its movable assets there, subject to any pre-existing attachment, execution, or charge¹²⁷—again, provided the foreign law extends to property in Hong Kong. To gain control over a foreign debtor's immovable property in Hong Kong (as such property does not vest in the foreign representative), a foreign representative may seek to be appointed as the receiver of the foreign debtor's property in Hong Kong, with the power to sell the property and distribute the proceeds to the debtor's creditors after satisfying prior encumbrances.¹²⁸

may be seen in relation to attachments made after the commencement of the foreign bankruptcy. The English/Hong Kong rule has been to uphold the title of the foreign assignee over the later attachments. *CHESHIRE AND NORTH*, *supra* note 83, at 912. In contrast, there is some support in the United States in favor of upholding the later attachments of local creditors. *Lowell*, *supra* note 53, at 261; *Nadelmann*, *Conflicts Rules for Bankruptcy*, *supra* note 53, at 84 n.161 (citing *JOSEPH STORY, CONFLICTS OF LAWS*, §§ 415 *et seq.* (2nd ed. 1841); *Clark v. Williard*, 294 U.S. 211 (1935)). However, even here the effect of the differences between the English/Hong Kong approach and the U.S. approach may be minimized, given that ever since the enactment of the U.S. Bankruptcy Act in 1898 these later attachments could be avoided as preferential transfers if the commencement of a bankruptcy case soon followed. *See Booth, A History of the Transnational Aspects of U.S. Bankruptcy Law*, *supra* note 16, at 14-15.

126. *See Modern Terminals* [1979] H.K.L.R. 512. *See also Woloniecki*, *supra* note 83, at 657-58.

127. *SMART*, *supra* note 34, at 217. *See also id.* at 141, 149 n.17 (quoting *Levasseur v. Mason & Barry Ltd.* (1891) 63 L.T. 700, 703, *aff'd*, [1891] 2 Q.B. 73, 77-78). *Smart* claims that a foreign liquidator would not have to make a formal application to the local courts. *Id.* at 217. *But see FLETCHER*, *supra* note 17, at 615 (taking a narrower view of the extra-territorial effect of a foreign winding up order and claiming that a foreign liquidator would first have to make a formal application to the local courts to recover the assets and that the courts might not grant assistance).

128. *See 2 DICEY AND MORRIS supra* note 83, Rule 170 & accompanying cmt., at 1178-79; *SMART*, *supra* note 34, at 140-41; *Woloniecki*, *supra* note 83, at 647, 658, 661. *See also CHESHIRE AND NORTH*, *supra* note 83 at 914; *Mark Gross, Foreign Creditor Rights: Recognition of Foreign Bankruptcy Adjudications in the United States and the Republic of Singapore*, 12 U. PA. J. INT'L BUS. L. 125, 149-50 (1991) (discussing English and, by extension, Singapore law). *See The Rules of the Supreme Court*, O. 30, 1994, cap. 4 sub. leg. A, *Laws of Hong Kong* [hereinafter the *Rules of the H.K. Supreme Court*]; *Supreme Court Ordinance* § 21L, 1994, cap. 4, *Laws of Hong Kong* [hereinafter the *H.K. Supreme Court Ordinance*]. The foreign representative should seek such relief through an application for an order in aid.

According to the Official Receiver, it is easier for foreign representatives from Commonwealth jurisdictions to obtain orders in aid from the Hong Kong courts. A strong rationale for this practice is that because the insolvency law of all Commonwealth jurisdictions is derived from the insolvency law of the United Kingdom, the Hong Kong courts are quite familiar with the substantial similarities between Hong Kong insolvency law and the insolvency law of other Commonwealth jurisdictions.

In Hong Kong, a foreign representative would also be allowed to commence civil proceedings, to seek declarations regarding the effect of foreign insolvency proceedings, and to recover debts.¹²⁹ The remedies available for debt collection in Hong Kong include the following: interim attachment of the debtor's property;¹³⁰ a writ of execution;¹³¹ garnishee proceedings;¹³² a charging order or stop order;¹³³ and an examination of a judgment debtor.¹³⁴ Hong Kong law also provides for a variety of harsh legal methods for collecting debts. These include the issuance of an order prohibiting a debtor from leaving Hong Kong¹³⁵ and the execution and enforcement of a judgment for money by imprisonment.¹³⁶ To pursue any of these options, the foreign representative must first prove that the foreign law permits him or her to commence the proceedings in Hong Kong.¹³⁷

Hong Kong law also permits a foreign representative to prove a debt in a Hong Kong insolvency, although in so doing the foreign representative must comply with Hong Kong law. This is demonstrated by the Hong Kong case, *Re Kowloon Container Warehouse Co. Ltd.* ("Kowloon Container"),¹³⁸ in which the members of the Kowloon Container Warehouse Co. Ltd. ("Kowloon Container") resolved in March 1976 to wind up the company by a members' voluntary winding up.¹³⁹ Certain shares of Kowloon Container were either registered in the name of, or beneficially owned by, Oyama Shipping Co. Ltd. ("Oyama Shipping"), a company incorporated in Japan. Oyama Shipping had been adjudicated bankrupt in Japan in 1975 and was wound up in Hong Kong in 1977. Inasmuch as Kowloon Container was a judgment creditor of Oyama Shipping under Hong Kong law, the issue arose whether the Hong Kong court should apply the "equitable prin-

129. SMART, *supra* note 34, at 135.

130. Rules of the H.K. Supreme Court, O. 44A, r. 7.

131. *Id.*, O. 46, O. 47.

132. *Id.*, O. 49.

133. *Id.*, O. 50.

134. *Id.*, O. 48.

135. *Id.*, O. 44A, r. 2; H.K. Supreme Court Ordinance § 21B; District Court Ordinance § 52E(1)(a), 1994, cap. 336, Laws of Hong Kong [hereinafter H.K. District Court Ordinance]. See *Tam Hing-yee v. Wu Tai-Wai* (1991) 1 H.K.P.L.R. 261 (upholding the issuance of a prohibition order by the District Court under § 52E(1)(a) of the H.K. District Court Ordinance as not violating the Hong Kong Bill of Rights. Hong Kong Bill of Rights Ordinance, 1994, cap. 383, Laws of Hong Kong). See discussion of this case in 1(2) HONG KONG BILL OF RIGHTS BULLETIN 13-14 (Andrew Byrnes & Johannes M.M.Chan, eds. Dec. 1991).

136. Rules of the H.K. Supreme Court, O. 49B; H.K. Supreme Court Ordinance § 21A.

137. SMART, *supra* note 34, at 139.

138. [1981] H.K.L.R. 210 [hereinafter *Kowloon Container*].

139. See *infra* note 190.

ciple" that "a person indebted to a trust estate who has an equitable interest in the estate cannot claim his share in that estate without first discharging his indebtedness."¹⁴⁰ In other words, the issue was whether Oyama Shipping was entitled to receive its share of the surplus assets of Kowloon Container without first having to contribute the amount it owed as judgment debtor.

Oyama Shipping's liquidator argued that the equitable principle should not be applicable,¹⁴¹ but that if the principle were held to be applicable it should apply only to the extent of the dividend that Kowloon Container would have received in the liquidation of Oyama Shipping in Japan.¹⁴² The liquidators for Kowloon Container argued, in contrast, that effect should be given to Hong Kong law and to the rights of the parties under Hong Kong law.¹⁴³ The court accepted the latter argument, applied the equitable principle, and held that Oyama Shipping could not receive a distribution from the surplus without first contributing the amount it owed as judgment debtor.¹⁴⁴

Under Hong Kong law a foreign representative may also seek injunctive relief, including the entry of a stay of a Hong Kong proceeding or execution¹⁴⁵ or the entry of a Mareva injunction. A Mareva injunction is an interlocutory order sought to prevent a defendant from dealing with his assets and removing them from the jurisdiction in which they are located.¹⁴⁶ However, assets subject to a Mareva injunction are made available to creditors generally and are not security for the petitioner.¹⁴⁷

In two cases decided in the late 1970's, *Mobil Sales and Supply*¹⁴⁸ and *Modern Terminals*,¹⁴⁹ the Hong Kong courts reached antithetical conclusions about whether to grant a stay requested by a foreign representative and thereby assist rehabilitation proceedings in the United

140. *Kowloon Container* [1981] H.K.L.R. at 213.

141. *Id.* at 214.

142. *Id.* at 218.

143. *Id.* at 222.

144. *Id.* at 226. More specifically, the court accepted the argument put forward by Kowloon Container's liquidators that although the Japanese liquidation should be recognized for some purposes (e.g., to enable the Japanese liquidator to participate in the Hong Kong proceedings), it should not be recognized for the purpose of discharging or calculating the amount that Oyama Shipping owed to Kowloon container. *Id.* at 220, 222.

145. *See, e.g., Modern Terminals* [1979] H.K.L.R. 512.

146. Gross, *supra* note 128, at 142; J. David Murphy, *Mareva Injunctions: Recent Developments*, in *LAW LECTURES FOR PRACTITIONERS* 19 (J. David Murphy ed. 1990).

147. Gross, *supra* note 128, at 142; Murphy, *supra* note 146, at 20.

148. [1979] H.K.L.R. 125.

149. [1979] H.K.L.R. 512.

States.¹⁵⁰ In *Mobil Sales and Supply* the Hong Kong High Court refused to order the stay of proceedings against a U.S. corporation undergoing rehabilitation under Chapter XI of the U.S. Bankruptcy Act. Several creditors of the U.S. debtor had issued writs in rem against some of the debtor's ships. Among the issues addressed by the court was whether the defendant, the debtor in possession, was the beneficial owner of the ships. After determining that the defendant was, in fact, the beneficial owner of the ships and did not hold them on trust for the creditors of the company, the court turned to the issue of the stay.¹⁵¹

The defendant feared that permitting the plaintiffs to seize the ships might jeopardize the debtor's rehabilitation and financially harm the creditors and shareholders. The defendant argued that if the plaintiffs proved their claims in the U.S. proceedings rather than seizing the ships, their lien would be given "due priority" and the only disadvantage to be suffered by the plaintiffs would be that of delay.¹⁵² The court, however, rejected the defendant's arguments, stating that:

what seems to be taking place at the moment is not a process of universal distribution but a process of deliberately preferential distribution. Large sums have already been paid out to other creditors. If a stay is now granted and the defendants should ultimately become insolvent those creditors may have gained substantial advantages over the present plaintiffs.¹⁵³

It is not clear from the court's discussion why the distribution was "deliberately preferential."¹⁵⁴ However, it is clear that the court adopted a territoriality-based approach that focused on the low priority that the plaintiffs would likely receive under U.S. law.

150. See also *In re McLean Indus.*, 74 B.R. 589, 592 (Bankr. S.D.N.Y. 1987). The debtor, United States Lines, commenced a Chapter 11 case under the U.S. Bankruptcy Code. Property of the estate included twelve large shipping vessels, four of which were arrested postpetition in Singapore and Hong Kong pursuant to arrest warrants issued by the Singapore and Hong Kong courts, notwithstanding the automatic stay under U.S. law. *Id.* at 591. The U.S. bankruptcy court entered an order including the following provision: "Nothing in this order approves or condones the commencement of the Arrest Proceedings. The jurisdictions in which they were commenced [Singapore and Hong Kong] should recognize and grant comity to these bankruptcy proceedings and the stay ordered by this Court on November 24, 1986 and provided by 11 U.S.C. § 362." *Id.* at 592. The U.S. court also modified the automatic stay to enable the holders of preferred ship mortgages to participate in and to take necessary steps to protect their interests in the pending arrest proceedings in Singapore and Hong Kong. *Id.* at 592.

151. *Mobil Sales & Supply* [1979] H.K.L.R. at 133.

152. *Id.* at 134.

153. *Id.*

154. See *id.*

In *Modern Terminals* the Hong Kong High Court adopted a more universality-oriented approach. The plaintiff, a Hong Kong company, sought summary judgment against the defendant, a U.S. debtor in possession also undergoing rehabilitation under Chapter XI in the United States. The U.S. debtor in possession sought to have the proceedings stayed on the ground that it had obtained protection under U.S. bankruptcy law.¹⁵⁵

The court held that recognition should be granted to the rehabilitation proceedings in the United States because the defendant held the company's assets on trust for the benefit of its creditors.¹⁵⁶ Next, the court considered whether to stay the Hong Kong proceedings. The court noted that a condition of the contract between the plaintiff and the defendant was "that the parties 'submit exclusively to the courts of Hong Kong and this contract shall be governed by Hong Kong Law.'"¹⁵⁷ The court also noted the defendant's arguments in favor of staying the proceedings on the basis of comity and because the plaintiff would be no worse off than other creditors if it proved its claim in the defendant's Chapter XI proceedings in the United States.¹⁵⁸ The court accepted the argument that the plaintiff would be treated the same as other similarly situated creditors.¹⁵⁹ But fearing that the plaintiff's claim might be disputed by the defendant and that the U.S. court might disclaim jurisdiction, the court refused to stay the Hong Kong proceedings and ordered judgment for the plaintiff.¹⁶⁰

The court then considered whether to order a stay of execution. The court was concerned that if it failed to order a stay of execution, the plaintiff would be able "to take the money on execution, oust the jurisdiction and control of the courts of the United States and divest the defendant as trustee of the creditors of the property here."¹⁶¹ The court stated that it "would have had no hesitation in ordering a stay . . . were it not for a decision . . . in the amalgamated admiralty actions of *Mobile [sic] Sales and Supply*."¹⁶² The court declined to follow the approach of the court in *Mobil Sales and Supply* and instead held "that a debtor in possession is not the beneficial owner of the assets but holds them in trust for the benefit of the creditors with the right to

155. *Modern Terminals* [1979] H.K.L.R. at 513.

156. *Id.* at 521. See *supra* notes 99-105 and accompanying text.

157. *Id.* at 522.

158. *Id.*

159. *Id.*

160. *Id.* at 522-23.

161. *Id.* at 523.

162. *Id.*

have the title as beneficial owner revested in it if the terms of the arrangement with the creditors are fulfilled.”¹⁶³ The court noted that the assets in Hong Kong were vested in the U.S. defendant and that the “principle enunciated in *Galbraith v. Grimshaw*”¹⁶⁴ was applicable.¹⁶⁵ The principle is as follows:

Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with the process of universal distribution¹⁶⁶

The court therefore ordered a stay of execution. In reaching its decision, the *Modern Terminals* court applied rules regarding the recognition of foreign bankruptcies that focus on the vesting of assets. As stated above, it would have been preferable for the court to have instead granted recognition on the basis of the recognition of foreign liquidations.¹⁶⁷ The court could have ordered a stay under this approach, as well, by recognizing the authority of a foreign liquidator to deal with assets in Hong Kong.¹⁶⁸ In any case, an underlying premise of the *Modern Terminals* approach is that given the existence of an insolvency declared abroad, Hong Kong creditors should not be able to grab a foreign debtor's assets in Hong Kong to the detriment of the debtor's other creditors elsewhere. Thus, *Modern Terminals* demonstrates a much more cooperative approach than does *Mobil Sales and Supply*.

As can be seen, there are a variety of non-insolvency options available to a foreign representative for protecting the assets of a foreign debtor in Hong Kong or for seeking other assistance from the Hong Kong courts. Cross-border cooperation will be extended in respect of movables that have not previously been attached by Hong Kong creditors, and perhaps even in respect of immovables through an auxiliary receivership. A foreign representative may also commence civil actions or seek injunctive relief, although as *Mobil Sales and Supply* demonstrates, assistance may not always be forthcoming.

163. *Id.* at 524.

164. (1910) A.C. 508.

165. *Modern Terminals* [1979] H.K.L.R. at 525.

166. *Id.* at 517 (quoting *Galbraith v. Grimshaw* (1910) A.C. at 513).

167. See *supra* notes 110-12 and accompanying text.

168. See *supra* note 127 and accompanying text. But see *Felixstowe Dock* [1989] Q.B. at 389 (recognizing a U.S. reorganization, but refusing to order the discharge of Mareva injunctions; however, the assets subject to the Mareva injunctions could not be distributed to creditors without the commencement of ancillary winding up proceedings in England).

2. Winding Up

Section 176 of the H.K. Companies Ordinance provides the Hong Kong High Court with the jurisdiction to wind up any "company,"¹⁶⁹ which is defined in Section 2 of the H.K. Companies Ordinance as a Hong Kong company.¹⁷⁰ Pursuant to provisions in Part X of the H.K. Companies Ordinance, the Hong Kong High Court also has jurisdiction to wind up foreign companies, which are called "unregistered" or "oversea" companies in Hong Kong.¹⁷¹

Liquidation offers a number of advantages not obtainable outside of insolvency. First, a liquidator may avoid uncompleted attachments or executions—under Hong Kong law a creditor may not retain the benefit of his attachment or execution unless the attachment or execution is completed before the commencement of the winding up.¹⁷²

169. H.K. Companies Ordinance § 176. Unlike the United States, Hong Kong does not have a separate insolvency court system. Rather, the High Court, which has jurisdiction over liquidations, is Hong Kong's highest trial court, and is part of the Hong Kong Supreme Court. One High Court judge generally hears company law cases and deals with contested winding up petitions. Unopposed winding up petitions are dealt with by the Registrar of the Supreme Court in open court. *Id.* § 180A.

170. Section 2 of the H.K. Companies Ordinance defines "company" as a "company formed and registered under this Ordinance or an existing company." An "existing company," in turn, is defined as a company formed and registered under earlier Hong Kong companies ordinances. H.K. Companies Ordinance § 2.

171. *Id.* §§ 327(1), 331. See *infra* note 206. Under § 326 of the H.K. Companies Ordinance, a foreign company is an "unregistered company." See text accompanying *infra* note 203. However, for a foreign company to be considered an "oversea company," it must establish a place of business in Hong Kong. See H.K. Companies Ordinance § 332. The heading for § 327A of the H.K. Companies Ordinance makes reference to "oversea companies." See *infra* note 199 and accompanying text. It is clear that a foreign company is generally not a "company" as defined in § 2 of the H.K. Companies Ordinance. See H.K. Companies Ordinance § 331, *infra* note 206. See also *Insurance Co. of Pa. v. Grand Union Insurance Co.* [1988] H.K.L.R. 541, 544 (dealing with an "oversea company").

172. H.K. Companies Ordinance § 269(1). Section 269(2) provides that an execution against goods is completed by seizure and sale or by the making of a charging order under § 20 of the H.K. Supreme Court Ordinance; an attachment of a debt, by receipt of the debt; and an execution against land, by seizure, by the appointment of a receiver, or by the making of a charging order under § 20 of the H.K. Supreme Court Ordinance. Thus, a "lien creditor" (as that term is used under U.S. law) under Hong Kong law does not receive special priority as does a "lien creditor" under § 506 of the U.S. Bankruptcy Code. 11 U.S.C. § 506 (1994). Rather, under Hong Kong law, until the execution or attachment is completed, the creditor is treated as an ordinary unsecured creditor. However, if the attachment or execution is not completed before the commencement of the winding up, the creditor is nevertheless entitled to retain moneys received prepetition by the creditor "whether under or in consequence of an execution or not," *Re Andrew* [1937] Ch. 122, 127; the creditor will lose only the benefit of the remaining charge for the balance of the debt, *id.* at 136. In the United States, in contrast, both the payments to the creditor and the "lien" itself might well be avoided as preferential transfers. 11 U.S.C. § 547 (1994). See *Axona Int'l Credit & Commerce Ltd.*, 88 B.R. at 601 (Bankr. S.D.N.Y. 1988). It should also be noted that contrary to the U.S. system in which attachment comes at an early

Second, a liquidator may exercise other avoidance powers pertaining to floating charges¹⁷³ and fraudulent preferences.¹⁷⁴ (These powers, however, are generally not as extensive as their U.S. counterparts.)¹⁷⁵ Third, in a liquidation any person who was knowingly a party to the carrying on of the business of a company "with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose" may be held personally liable for any or all of the company's debts.¹⁷⁶ Fourth, the liquidator may seek the application of certain broad investigative powers.¹⁷⁷ Last, a stay commences upon the making of the winding up order, or earlier upon the appointment of a provisional liquidator.¹⁷⁸ Under the stay, no action or proceeding may be continued or commenced against the company, except with leave of court.¹⁷⁹ The stay, however, does not prevent secured creditors from exercising their rights in respect of their security.¹⁸⁰

Hong Kong companies are wound up by the court pursuant to Section 177 of the H.K. Companies Ordinance, which contains both insolvency and non-insolvency grounds. Section 177(1) provides that

stage on an *ex parte* application, in Hong Kong, as a rule, execution follows judgment. *American Express Int'l Banking Corp. v. Johnson* [1984] H.K.L.R. 372, 376.

173. H.K. Companies Ordinance § 267. Under this section, if an insolvent company grants a floating charge within twelve months of the commencement of the winding up, the floating charge shall be invalid, except to the amount of any cash advanced to the company at the time of or after the creation of the charge, and in consideration for the charge, together with interest. The H.K. Companies Ordinance does not define the term "floating charge." Cf. R.M. GOODE, *COMMERCIAL LAW* 788 (1982) (describing the underlying concept of a floating charge as "that of a class of revolving assets [e.g., inventory] which the company is to be free to manage and deal with in the ordinary course of business until an event occurs which entitles the creditor to intervene and assert his security rights over the assets then held or subsequently acquired by the company").

174. H.K. Companies Ordinance § 266. (In contrast to the 90-day avoidance period under § 547 of the U.S. Bankruptcy Code, the relevant period under Hong Kong law is six months.). In addition, dispositions of the company's property made after the commencement of the winding up shall be void, unless the court orders otherwise. *Id.* § 182.

175. For example, contrary to U.S. law, which focuses primarily on preventing "last minute grabs" by creditors, Hong Kong law focuses on the voluntary nature of the debtor's act and therefore on the debtor's state of mind in making a payment or transfer. Moreover, a payment or transfer made by a debtor under the fear of legal process or as the consequence of the pressure of a creditor is not voluntarily made and, therefore, is not a fraudulent preference. H.K. Companies Ordinance § 266; H.K. Bankruptcy Ordinance § 49; *Sharp v. Jackson* [1899] A.C. 419. Unlike U.S. law, §§ 266 and 269 of the H.K. Companies Ordinance do not penalize, and even promote, "last minute grabs" by creditors.

176. H.K. Companies Ordinance § 275.

177. *Id.* §§ 221, 222.

178. *Id.* § 186.

179. *Id.* See also *id.* § 181 (after the presentation of a winding up petition, but before the making of a winding up order or the appointment of a provisional liquidator, actions or proceedings against the company may be stayed).

180. GOODE, *supra* note 173, at 898-99.

a Hong Kong company may be wound up by the court for the following reasons:

- (a) the company has by special resolution resolved that the company be wound up by the court;
- (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (c) the number of members is reduced below two;
- (d) the company is unable to pay its debts;¹⁸¹
- (e) the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved;
- (f) the court is of the opinion that it is just and equitable that the company should be wound up.¹⁸²

The clearest insolvency ground is that the company is unable to pay its debts. Depending on the circumstances, the grounds listed in (a), (e), and (f) might also be insolvency-related.

The court has the discretion to dismiss a winding up petition and not make a winding up order under Section 180 of the H.K. Companies Ordinance or under the court's inherent jurisdiction. Although rarely exercised, the court also has the discretion under Section 209 to stay winding up proceedings at any time after the winding up order has been made.¹⁸³ In the recent case of *Bicoastal Corp. v. Shinwa Co. Ltd.*,¹⁸⁴ the Hong Kong Court of Appeal took the unusual action of staying winding up proceedings before the winding up order had been made, thereby staying the prosecution of the petition.¹⁸⁵

181. H.K. Companies Ordinance § 177(1)(d). Under § 178 of the H.K. Companies Ordinance:

- (1) A company shall be deemed to be unable to pay its debts—
 - (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding HK\$5,000 then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
 - (b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
 - (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

182. *Id.* § 177(1). See also *id.* § 177(2) (specifying the grounds upon which a company may be wound up by the court on the application of the Registrar of Companies).

183. This power is analogous to that contained in 11 U.S.C. § 305 (1994).

184. [1994] 1 H.K.L.R. 65.

185. *Id.* at 68 (ordering a stay of all proceedings in the Hong Kong winding up, including the application to amend the winding up petition, until a U.S. court determined an appeal by the Hong Kong debtor from a final judgment entered in a Florida bankruptcy court).

A Hong Kong liquidator generally has more independence than his U.S. counterpart, and there is less creditor participation in Hong Kong liquidations than in U.S. liquidations. This is generally true of company liquidation procedures in many Commonwealth jurisdictions.¹⁸⁶ There is also more governmental involvement in liquidations in Hong Kong than in the United States; the Official Receiver usually plays a major role. After the presentation of a winding up petition, but before the making of a winding up order, the court may appoint an interim provisional liquidator, and if it does so, it usually appoints the Official Receiver.¹⁸⁷ Upon the making of the winding up order the Official Receiver becomes the provisional liquidator,¹⁸⁸ and in most cases he continues on as liquidator.¹⁸⁹ In some cases a "committee of inspection" (creditors' committee) is appointed by the court.¹⁹⁰

Turning to the winding up of foreign companies, a foreign liquidator should realize that it will often be unnecessary to commence a winding up to reach assets in Hong Kong. For instance, to the extent that movable assets in Hong Kong are not subject to any pre-existing attachment, execution, or charge, the foreign liquidator should be able to get the assets transferred to him as the representative of the foreign company or estate.¹⁹¹ Similarly, a foreign liquidator might be able to be appointed as receiver of the foreign company's immovable property with the power to sell the property and distribute the proceeds to

186. See Westbrook, *Theory and Pragmatism in Global Insolvencies*, *supra* note 48, at 476-77. See also Booth, *Recognition of Foreign Bankruptcies*, *supra* note 23, at 206-11 (discussing the procedures under Australian companies law for protecting the interests of unsecured creditors).

187. See H.K. Companies Ordinance § 193.

188. *Id.* § 194(a).

189. See *id.* § 194(d). The appointment of a private liquidator usually depends on whether there are sufficient assets to justify such an appointment. Gross, *supra* note 128, at 143 n.133 (citing R.M. Goode, *The Secured Creditor and Insolvency Under English Law*, 44 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 674, 699 (1980)). In addition, in Hong Kong, private liquidators are appointed only in complicated cases. In Hong Kong, as a rule, accountants are appointed as private liquidators.

For the period April 1, 1993-March 31, 1994, the Official Receiver was appointed liquidator in 424 cases and private liquidators were appointed in 9 cases. ANNUAL DEPARTMENTAL REPORT OF THE HONG KONG OFFICIAL RECEIVER 1993-94 ¶¶ 3.6.2, 3.6.4, at 5.

190. H.K. Companies Ordinance § 206. Other provisions relevant to compulsory liquidations are at §§ 169-227F and 263-96 of the H.K. Companies Ordinance. Hong Kong law also provides for a more informal corporate liquidation procedure called a voluntary winding up. *Id.* §§ 228-233. If the company is solvent, the procedure is called a members' voluntary winding up and is controlled by the members (shareholders) who are also empowered to appoint the liquidator. See *id.* §§ 234-39A, 249-57, 263-96. If the company is insolvent, the procedure is called a creditors' voluntary winding up and provides for greater involvement by the creditors. See *id.* §§ 240-48, 249-57, 263-96.

191. See *supra* note 127. Of course, the foreign law would have to extend to the property in Hong Kong.

creditors.¹⁹² However, if these collection attempts prove unsuccessful, the foreign liquidator should consider commencing a liquidation against the foreign company.¹⁹³ Petitioning for liquidation would also be advisable where the foreign liquidator anticipates that the unsecured creditors would benefit from the exercise of a liquidator's avoidance or investigatory powers, or from the stay.¹⁹⁴ If a winding up order is made, the foreign liquidator might also request the Hong Kong court to order the turnover of Hong Kong assets to the foreign liquidation for distribution abroad.¹⁹⁵

At present, there is no provision in the H.K. Companies Ordinance that authorizes a foreign representative to commence a winding up in Hong Kong of the foreign company that she represents, or whose estate she represents, in the foreign insolvency. Section 179(1) of the H.K. Companies Ordinance states:

An application to the court for the winding up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any creditor or creditors . . . , contributory or contributories or the trustee in bankruptcy or the personal representative of a contributory, or by all or any of those parties, together or separately. . . .¹⁹⁶

Thus, if a foreign representative wants to commence a winding up proceeding against the foreign company that she represents, or whose estate she represents, she must either convince one of the foreign company's creditors to file the petition or file the petition herself on behalf of the foreign company.¹⁹⁷ To fill in the gap in current law, I would propose that an amendment based on Section 303(b)(4) of the U.S. Bankruptcy Code be made to Part X of the H.K. Companies Ordinance to enable a foreign representative to petition in Hong Kong

192. See *supra* note 128.

193. See FLETCHER, *supra* note 17, at 615.

194. See *supra* notes 172-79.

195. A turnover order was made in the liquidation involving Irish Shipping Ltd., Companies Winding Up No. 408 of 1984. See *infra* note 231.

196. H.K. Companies Ordinance § 179(1). This section is applicable to the winding up of foreign companies pursuant to §§ 327(1) and 331 of the H.K. Companies Ordinance. See *infra* note 206 and accompanying text.

197. The latter approach was used in *Re Irish Shipping Ltd.* [1985] H.K.L.R. 437, 439. Another possible scenario, albeit more theoretical than likely, is that a company incorporated in Hong Kong is liquidated abroad and the foreign representative of that company comes to Hong Kong to commence a winding up against the company. In that case it would be unlikely that a Hong Kong court would grant recognition to the foreign representative.

for the liquidation of the foreign company that she represents, or whose estates she represents, in the foreign proceeding.¹⁹⁸

The relevant sections for winding up foreign companies are included in Part X of the H.K. Companies Ordinance, which is entitled "Winding Up Of Unregistered Companies." Section 327A is entitled "Oversea companies may be wound up although dissolved," and provides as follows:

Where a company incorporated outside Hong Kong which has been carrying on business in Hong Kong ceases to carry on business in Hong Kong, it may be wound up as an unregistered company under this Part [X of the H.K. Companies Ordinance], notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the place of its incorporation.¹⁹⁹

Although Hong Kong precedent exists for winding up foreign companies under Section 327A,²⁰⁰ in practice, this section is rarely used.²⁰¹ Instead, Hong Kong courts usually wind up a foreign company as an "unregistered company" pursuant to Sections 326 and 327 of Part X of the H.K. Companies Ordinance.²⁰²

Section 326 defines "unregistered company" as including any partnership, limited partnership, association, and company except for the following:

- (a) a company registered under the Companies Ordinance 1865 (1 of 1865), or under the Companies Ordinance 1911 (58 of 1911), or under this Ordinance;

198. Of course, the foreign representative should have to demonstrate that she was authorized under foreign law to commence the winding up in Hong Kong.

199. H.K. Companies Ordinance § 327A. Smart's observation about the use of the term "oversea company" in the English equivalent to the heading to § 327A of the H.K. Companies Ordinance is also relevant for the purposes of Hong Kong law. In terms of Hong Kong law, the argument is that the use of the term "oversea companies" in the heading to § 327A is inappropriate because the term "oversea company" normally refers to a foreign company that has established a place of business in Hong Kong. SMART, *supra* note 34, at 68. See H.K. Companies Ordinance § 332. However, "[a] foreign company may carry on business (within [§ 327A]) without being an oversea company (which must have an established place of business)." SMART, *supra* note 34, at 68.

200. *Dairen Kisen Kabushiki Kaisha v. Shiang Kee* [1941] A.C. 373 P.C. H.K. (involving the liquidation in Hong Kong (under § 313(2) of the Companies Ordinance (cap. 32) 1932, re-enacted with some minor changes as § 327A of the H.K. Companies Ordinance) of the Hong Kong branch of a company incorporated and dissolved in the Republic of China).

201. Philip Smart, *Cross-Border Insolvency*, in LAW LECTURES FOR PRACTITIONERS 1991 139, 142 (Jill Cottrell ed. 1991). However, a filing under § 327A was recently made in Macau-Mokes Group Ltd., Companies Winding Up No. 62 of 1994 (Feb. 3, 1994).

202. Smart, *supra* note 201, at 142.

(b) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association, or company;

(c) a partnership registered in Hong Kong under the Limited Partnership Ordinance (Cap. 37).²⁰³

Section 327 is broader than and includes an “oversea company” under Section 327A—Section 327, unlike Section 327A, does not limit itself to where a foreign company “which has been carrying on business in Hong Kong, ceases to carry on business in Hong Kong.”²⁰⁴ Rather, Section 327(1), in turn, provides that subject to the provisions of Part X of the H.K. Companies Ordinance, any unregistered company may be wound up under the H.K. Companies Ordinance. Under Section 327(3), an unregistered company may be wound up under the following circumstances:

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) if the court is of opinion that it is just and equitable that the company should be wound up.²⁰⁵

Pursuant to Sections 327(1) and 331 of the H.K. Companies Ordinance, in the winding up of unregistered companies the provisions in Part X of the H.K. Companies Ordinance are supposed to supplement the other winding up provisions contained in the H.K. Companies Ordinance—although Sections 327(1) and 331 are somewhat inelegantly drafted, overlap, and even conflict in scope.²⁰⁶ Additional provisions

203. H.K. Companies Ordinance § 326. Interestingly, although a “partnership” is not a “company” under § 2 of the H.K. Companies Ordinance, a Hong Kong partnership with eight or more partners and a foreign partnership are both defined as an “unregistered company” and may therefore be wound up under Part X of the H.K. Companies Ordinance. Bankruptcy proceedings may also be commenced against a partnership carrying on business in Hong Kong under § 7(1) of the H.K. Bankruptcy Ordinance. *See also* H.K. Bankruptcy Ordinance § 109.

204. Compare H.K. Companies Ordinance § 327 with § 327A. *See SMART, supra* note 34 at 68.

205. *Id.* § 327(3). Section 327(4) of the H.K. Companies Ordinance defines the circumstances in which an unregistered company shall be deemed to be unable to pay its debts. These criteria are somewhat broader than the criteria applicable to the winding up of Hong Kong companies that are contained in § 178 of the H.K. Companies Ordinance because § 327(4) includes provisions regarding unsatisfied actions and executions against members of the unregistered company for debts due from the company.

Section 327(2) provides that an unregistered company may not be wound up voluntarily under the H.K. Companies Ordinance.

206. Section 327(1) provides as follows:

Subject to the provisions of this Part [X of the H.K. Companies Ordinance], any unregistered company may be wound up under this Ordinance, and all the provisions of

applicable to the winding up of unregistered companies include the previously mentioned broader definition of the company's inability to pay its debts,²⁰⁷ and an extension of the stay of actions and proceedings upon the making of a winding up order to actions and proceedings against contributories of the company in respect of company debts.²⁰⁸

The H.K. Companies Ordinance, except for the reference in Section 327A to ceasing to carry on business, is silent as to the jurisdictional connection that must exist between the foreign debtor and Hong Kong for a winding up to be commenced in Hong Kong. However, since the English case of *Banque des Marchands de Moscou v. Kindersley*²⁰⁹ was decided in 1951, it has been settled that a foreign company with assets in Hong Kong may be wound up in Hong Kong.²¹⁰ In 1973, this rule was extended further in the English case,

this Ordinance with respect to winding up shall apply to an unregistered company, with the exceptions and additions mentioned in this section.

Id. § 327(1). Section 331 provides as follows:

The provisions of this Part [X of the H.K. Companies Ordinance] with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Ordinance contained with respect to winding up companies by the court, and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Ordinance:

Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Ordinance, and then only to the extent provided by this Part [X of the H.K. Companies Ordinance].

Id. § 331. As can be seen, § 327(1) provides that the general winding up provisions in the H.K. Companies Ordinance are subject to the "exceptions and additions" of § 327. In contrast, § 331 provides that the winding up provisions elsewhere in the ordinance are to be supplemented, but not restricted, by all the provisions in Part X.

207. See *supra* note 205.

208. H.K. Companies Ordinance § 330. Compare *id.* § 186. See text accompanying *supra* note 178. The court's power to stay actions or proceedings upon the filing of a winding up petition is similarly extended by § 329 of the H.K. Companies Ordinance, but without the restriction regarding the collection of company debts. Compare *id.* § 181. See *supra* note 179.

209. [1951] Ch. 112.

210. Smart, *supra* note 201, at 143; Kurt H. Nadelmann, *Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company*, 52 N.Y.U. L. REV. 1, 25 (1977) (discussing the English rule). See 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 157, at 1120 (citing this 1951 case in support of the view that until recently, it was thought that having assets in England was a jurisdictional requirement for winding up a foreign company under English law).

Comparisons may be made with U.S. law. Section 109(a) of the U.S. Bankruptcy Code provides that to be a debtor, a "person" must reside or have a domicile, a place of business, or property in the United States. 11 U.S.C. § 109(a) (1994). Section 101(41) defines "person" as including an individual, partnership, or corporation. *Id.* § 101(41). In § 304 cases, some courts have applied § 109(a). See, e.g., *In re Lines*, 81 B.R. 267 (Bankr. S.D.N.Y. 1988). However, another court recently held that the eligibility requirements of § 109 are not applicable in § 304 cases, and rather that the test should be whether "there is a strong nexus with this country and this district." *In re Brierley*, 145 B.R. 151, 159 (Bankr. S.D.N.Y. 1992) (quoting *In re Gee*, 53 B.R. 891, 899 (Bankr. S.D.N.Y. 1985)).

Re Compania Merabello San Nicholas S.A.,²¹¹ which involved the application of Section 399 of the United Kingdom Companies Act 1948, the then English equivalent to Section 327 of the H.K. Companies Ordinance. The court held that for the purposes of establishing jurisdiction in a case involving a foreign company:

- (1) There is no need to establish that the foreign company ever had a place of business here.
- (2) There is no need to establish that the company ever carried on business here, unless perhaps the petition is based upon the company carrying on or having carried on business.
- (3) A proper connection with the jurisdiction must be established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and (b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable.
- (4) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be "commercial" assets, or assets which indicate that the company formerly carried on business here.
- (5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding up: it suffices if by the making of the winding up order they will be of benefit to a creditor or creditors in some other way.
- (6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding up order, the jurisdiction is excluded.²¹²

The presence of assets as a basis for jurisdiction for Section 327 cases was further expanded in later cases, most notably, for our purposes, the 1985 Hong Kong case, *Re Irish Shipping Ltd.* ("*Irish Shipping*").²¹³ Irish Shipping Ltd., a company being wound up in Ireland, had never carried on business or established a place of business in Hong Kong.²¹⁴ On December 8, 1984, Irish Shipping's official liquidator petitioned to wind up Irish Shipping as an unregistered company pursuant to Section 327 of the H.K. Companies Ordinance.²¹⁵ The petition was sought on the grounds that the company was unable to

211. [1973] Ch. 75.

212. *Id.* at 91-92.

213. [1985] H.K.L.R. 437 [hereinafter *Irish Shipping*]. See also the following English cases: *Re Allobrogia S.S. Corp.* [1978] 3 All E.R. 423 (expanding the presence of assets test to include a right of action that has a reasonable possibility of success); *Re Eloc Electro-Optieck & Communicatie B.V.* [1982] Ch. 43 (further expanding the presence of assets test by finding that the assets upon which to found jurisdiction need not belong to the company, but may belong to an outside source).

214. *Irish Shipping* [1985] H.K.L.R. at 439.

215. *Id.*

pay its debts and that it was just and equitable for a winding up order to be made.²¹⁶

The official liquidator claimed jurisdiction on the basis of the "imminent arrival" of the Irish Rowan (a ship owned by the debtor) in Hong Kong.²¹⁷ The liquidator's goal was to get possession of and sell the Irish Rowan and then distribute the sales proceeds among the general creditors. When the Irish Rowan arrived in Hong Kong on February 14, 1985, a number of creditors who intended to proceed with their admiralty actions *in rem* opposed the liquidator's petition.

In applying the presence of assets test from *Re Compania Merabello San Nicholas S.A.*, the court in Irish Shipping added in *obiter* that "the liquidator is not precluded from presenting a petition before the asset is within the jurisdiction. It is sufficient to found jurisdiction if there are assets here when the petition is heard."²¹⁸ However, this additional ground was not needed to found jurisdiction in *Irish Shipping*, because the court noted that "there were in fact assets within the jurisdiction both at the date of the presentation of the petition and at the date of the hearing."²¹⁹

The court's contention that jurisdiction may be satisfied at the time the hearing is held is disturbing. In my view, the date for determining jurisdiction should be the date that the winding up petition is presented. As Philip Smart states, "[e]ither the court has jurisdiction when the petition is presented or it does not."²²⁰

The presence of assets test, however, is not the only jurisdictional basis for winding up a foreign company in Hong Kong. It is now generally accepted, on the basis of the English decision of *Re A Company (No. 00359 of 1987)*,²²¹ that it is not essential for assets to be present and that "provided a sufficient connection with the jurisdiction is shown, and there is a reasonable possibility of benefit for the creditors from the winding up, the court has jurisdiction to wind up the foreign

216. *Id.*

217. *Id.*

218. *Id.* at 444.

219. *Id.*

220. SMART, *supra* note 34, at 62 n.14. See also Smart, *supra* note 201, at 143-44. The English case of *Re Real Estate Development Co.* [1991] B.C.L.C. 210 supports the position urged here that the appropriate time for determining jurisdiction is at the time the winding up is commenced. In that case, the court stated that "it seems . . . to be necessary, where there is no asset within the jurisdiction at the presentation of a petition, to establish a link of genuine substance between the company and this country." *Id.* at 217.

221. [1988] Ch. 210 [hereinafter *Okeanos Maritime Corp.*].

company.”²²² An issue that needs to be addressed is whether the presence of assets remains an independent jurisdictional basis or whether it is now a factor that should be considered under a “sufficient connection” analysis.

After finding that the jurisdictional requirements have been met, the court must decide whether to exercise its jurisdiction and order the winding up of the foreign company; as under U.S. law, the ordering of ancillary relief is not automatic, but rather is dependant on certain conditions being satisfied.²²³ *Irish Shipping* is also noteworthy for its discussion of the criteria to be reviewed when making this decision. After finding that jurisdiction existed for the court to hear the petition,²²⁴ the court in *Irish Shipping* considered these factors, which in Hong Kong, unlike in the United States,²²⁵ are not contained in legislation. Firstly, the court noted that creditors opposing the making of a winding up order are required to give “satisfactory reasons” supporting their position and that the creditors in *Irish Shipping* had failed to do so.²²⁶ Secondly, the court stressed the need to consider the inter-

222. *Id.* at 225-26 (finding a sufficient connection, including (1) that the debt owed by the foreign company to the petitioner was incurred in England and governed by English law and (2) that the foreign company has carried on business in England through its agents). See also, e.g., the following English cases and commentators that have adopted the test from *Okeanos Maritime Corp.: Re A Company* (No. 003102 of 1991): *Ex parte Nyckeln Finance Co.* [1991] B.C.L.C. 539, 540 [hereinafter *Ex parte Nyckeln Finance Co.*] (finding a sufficient connection); *Re Real Estate Development Co.* [1991] B.C.L.C. 210, 217 (also requiring that the court be able to exercise jurisdiction over one or more persons who will benefit from the making of the winding up order; not finding a sufficient connection); 2 DICEY AND MORRIS *supra* note 83, cmt. to Rule 157, at 1121-23. But see SMART, *supra* note 34, at 64-65 (criticizing the vagueness of the “sufficient connection” test and recommending instead the adoption of a jurisdictional test based on the carrying on of business “either directly or through an agent” to supplement the presence of assets test; but retaining the requirement “that there is a reasonable possibility of benefit accruing to creditors from the making of a winding up order.”) There is also language in *Okeanos Maritime Corp.* [1988] Ch. 210, at 226, that in determining whether jurisdiction exists, “[i]t is also appropriate for the court to consider whether any other jurisdiction is more appropriate for the winding up” This test was also adopted in *Ex parte Nyckeln Finance Co.* [1991] B.C.L.C. at 540. However, as has been noted in a later case, as well as by commentators, this factor should certainly be a factor for the court to consider in exercising its discretion. *Re Wallace Smith & Co.* [1992] B.C.L.C. 970, 985; SMART, *supra* note 34, at 64, n.5; 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 157, at 1121. To hold otherwise would make it impossible for the Hong Kong courts to order an ancillary or concurrent winding up in Hong Kong. See *Re Wallace Smith & Co.* [1992] B.C.L.C. at 985: See also *infra* notes 230-39 and accompanying text.

223. See SMART, *supra* note 34, at 235-40.

224. In addition, the court found that the official liquidator had been given retrospective sanction from the Irish court to commence the Hong Kong proceedings and that he had authority to present the petition in Hong Kong. *Irish Shipping* [1985] H.K.L.R. at 441-42.

225. See 11 U.S.C. § 304(c) (1994), text accompanying *supra* note 36.

226. *Irish Shipping* [1985] H.K.L.R. at 444-45. This same factor has been applied under U.S. case law. See *In re Culmer*, 25 B.R. 621, 628 (Bankr. S.D.N.Y. 1982).

ests of unsecured creditors (e.g., equality of distribution) and of the public and then noted that it was in the public interest for the unsecured creditors to benefit from the sale of the vessel.²²⁷ Thirdly, the court considered the "comity of nations whereby it is desirable that the court should assist the liquidator in another jurisdiction to carry out his duties unless good reasons to the contrary have been put forward" and found that sufficient reasons had not been advanced.²²⁸

The court ruled that the opposing creditors were not entitled to the preferences they had claimed, and then the court exercised its jurisdiction to order the winding up.²²⁹ The court also noted: "The jurisdiction of this court in the liquidation would be ancillary as far as possible to the winding up in Ireland and would provide assistance to the official liquidator in the collection and preservation of the assets within Hong Kong."²³⁰

When the winding up of Irish Shipping in Hong Kong was concluded in 1985, the Hong Kong court again stressed the ancillary nature of the Hong Kong proceeding and ordered the Hong Kong liquidator to turn over the surplus assets (after paying the costs of the Hong Kong liquidation) to the Irish liquidator for a *pari passu* distribution to all creditors of Irish Shipping (after paying the Irish liquidator's costs).²³¹

The word "ancillary" as used by the Hong Kong court has a different meaning from the word as used in Section 304 of the U.S. Bankruptcy Code. As noted earlier, in an ancillary case under Section 304, a trustee is not appointed, there is no automatic stay, and the avoidance powers available under the foreign law may be applicable in the United States.²³² In contrast, in an ancillary winding up under Hong Kong law, a liquidator is appointed, a stay comes into effect, and the Hong Kong avoidance powers are applicable.²³³ Moreover, if

227. *Irish Shipping* [1985] H.K.L.R. at 444-45. In the United States, the equality of distribution principle is included under 11 U.S.C. § 304(c)(1) (1994).

228. *Irish Shipping* [1985] H.K.L.R. at 445. In the United States, comity is included in 11 U.S.C. § 304(c)(5) (1994).

229. *Irish Shipping* [1985] H.K.L.R. at 446.

230. *Id.* at 445.

231. *Re Irish Shipping, Companies Winding Up No. 408 of 1984, Order* (June 25, 1985) (the turnover was to be made after receipt by the Hong Kong liquidator of (1) an order of the Irish court allowing the distribution of the Hong Kong assets in the Irish proceeding and (2) evidence of the giving of security to the Irish court).

232. See *supra* notes 37-48 and accompanying text.

233. See *supra* notes 172-80 and accompanying text. However, it might be possible for the foreign court to set aside a transaction under foreign law and then request the Hong Kong court to give effect to that order. See SMART, *supra* note 34, at 264.

a turnover order is made, the Hong Kong court would most likely require priorities (called preferential debts in Hong Kong²³⁴) and secured creditors' claims to be satisfied before sending the surplus abroad.²³⁵ This result under Hong Kong law is similar to a result that can be achieved under Section 303(b)(4) of the U.S. Bankruptcy Code; thus, *Irish Shipping* is analogous to the U.S. case of *In re Axona International Credit and Commerce Ltd.*²³⁶

The general view of authorities on English transnational insolvency law is that an ancillary winding up is one kind of concurrent winding up or concurrent insolvency.²³⁷ Although adopting this view, Philip Smart stresses the distinctive characteristics of an ancillary liquidation in distinguishing it from other concurrent insolvencies.²³⁸ I take the distinction further and conceive of a continuum of types of concurrent insolvencies, including both concurrent liquidations and concurrent bankruptcies commenced in Hong Kong by a foreign representative against the foreign company, partnership, or individual that she represents, or whose estate she represents, abroad: at one end of the continuum is an "ancillary insolvency" (either an "ancillary winding up" or an "ancillary bankruptcy"²³⁹), where the primary aim of the Hong Kong liquidator or trustee is to assist the foreign representative; at the other end is a full-scale insolvency, where the Hong Kong liquidator or trustee is on equal footing with the foreign representative. When the terms are used in this way, it can be seen that it would be helpful to enact legislative criteria to assist Hong Kong courts in determining when ancillary assistance is appropriate.

In any event, if a Hong Kong court decides not to provide ancillary assistance to a winding up abroad, other forms of cross-border assistance could still be forthcoming in the concurrent insolvency. All assets could be administered and distributed to creditors in a full-scale proceeding in Hong Kong, or the Hong Kong court could approve a scheme of arrangement entered into by the Hong Kong liquidator and the foreign liquidator that provides for distributions to creditors

234. See H.K. Companies Ordinance § 265.

235. See SMART, *supra* note 34, at 248-50. For a discussion of ancillary liquidations in general under English law, see *id.* at 233-52.

236. 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991) (discussed in *infra* Part V.B).

237. See SMART, *supra* note 34, at 213-14; FLETCHER, *supra* note 17, at 616; Woloniecki, *supra* note 83, at 661-62.

238. SMART, *supra* note 34, at 213-14, 232-52.

239. English commentators do not generally use the term "ancillary bankruptcy."

worldwide. Such a scheme would have to be in accordance with the law of the jurisdiction in which the debtor is incorporated.²⁴⁰

Cooperation might also be achieved among concurrent insolvencies of various members of one corporate family when the representatives of the respective debtors negotiate settlement agreements. An example of such cross-border cooperation in which the Hong Kong courts took part involved the insolvency of various members of the Deak-Perera group of companies. In December 1984, Deak & Co. Inc. ("Deak"), Deak-Perera Wall Street, Inc. ("Deak Wall Street"), and Deak-Perera International Banking Corp. (collectively, the "U.S. Debtors") each filed a petition in the U.S. Bankruptcy Court for the Southern District of New York for reorganization under Chapter 11. Two months later, a winding up order was made by the Hong Kong Supreme Court against Deak-Perera Far East Ltd. (DPFE), a wholly-owned subsidiary of Deak Wall Street, with its principal place of business in Hong Kong. The Hong Kong Official Receiver was appointed as the liquidator of DPFE and subsequently asserted various claims of DPFE against the U.S. Debtors in the U.S. reorganizations.

In December 1985 the Official Receiver entered into a stipulation with the U.S. Debtors and the official committee of unsecured creditors appointed in the U.S. cases. Pursuant to the stipulation, the U.S. Debtors agreed to pay US\$2.36 million to the Official Receiver in full settlement, release, and discharge of all claims that DPFE or the Official Receiver may have had against the U.S. Debtors and their "affiliates."²⁴¹ This settlement was approved by the U.S. bankruptcy court in December 1985, having been approved earlier by the Hong Kong High Court.²⁴²

Meanwhile, in May 1987 the Official Receiver, acting as liquidator in the Hong Kong liquidation of DPFE, commenced proceedings against seven defendants, three of whom resided, and were duly served, in Hong Kong. In June 1987 a Master entered an order allowing the Official Receiver to issue a concurrent writ, copies of which were allowed to be served on the four other defendants outside Hong Kong, including R. Leslie Deak, who was sued as the personal representative of Nicholas Louis Deak, and Otto Emil Roethenmund. Nicholas Louis Deak and Roethenmund had been directors of and had controlled DPFE in Hong Kong, Deak in the U.S., and other cor-

240. See SMART, *supra* note 34, at 214-15. See also Woloniecki, *supra* note 83, at 661-62.

241. Affiliates were as defined in 11 U.S.C. § 101(2) (1994), and all subsidiaries thereof.

242. R. Leslie Deak v. Deak Perera Far East Ltd. (in liq.) [1991] 1 H.K.L.R. 551, 555. For a copy of the stipulation, which sets out the facts noted above, see *id.* at 555-57.

porations in the Deak-Perera Group of Companies. The Official Receiver asserted that they were liable to DPFE for breach of their fiduciary duties and for an account of trust monies misapplied.²⁴³ R. Leslie Deak and Roethenmund contested the issuance of writs for service on them outside of Hong Kong. After litigation in the lower courts, the Hong Kong Court of Appeal found that the Official Receiver had disclosed a "a good arguable claim" as against both R. Leslie Deak and Roethenmund.²⁴⁴ The court also found that R. Leslie Deak had disclosed a good arguable defense, but that Roethenmund had not done so.²⁴⁵

The court then turned to the issue of whether the *forum conveniens* should be Hong Kong or New York. Finding that the matters affecting the question of *forum conveniens* were "so finely balanced," the court decided not to interfere with the lower court's determination that Hong Kong was the appropriate court and upheld the order for service on the two defendants.²⁴⁶

In August 1991 Roethenmund filed a complaint for declaratory judgment and permanent injunctive relief in the U.S. bankruptcy court. He wanted the court to direct that the terms of the stipulation applied to him since he was an "affiliate" within the meaning and contemplation of the stipulation.²⁴⁷ The Official Receiver moved to dismiss the complaint. In March 1992, the motion was heard by the same bankruptcy judge who had approved the stipulation. The judge dismissed the Official Receiver's motion and ruled that he should file an answer. Instead of filing an answer, the Official Receiver filed a memorandum indicating that he did not wish to participate further in the U.S. proceeding. Consequently, in April 1992, Roethenmund obtained a declaratory judgment stating that he was an affiliate at the time of the stipulation and that he was released and discharged from all claims that DPFE or the Official Receiver had or may have had against him.²⁴⁸

Meanwhile in Hong Kong, the Official Receiver sued Roethenmund for breach of his fiduciary duties, arguing (1) that he had not intended to include Roethenmund in the stipulation and that the term "affiliate" applied to an individual is not a concept known in

243. *Id.* at 555.

244. *Id.* at 559.

245. *Id.*

246. *Id.* at 560.

247. Deak Perera (Far East) Ltd. (in liq.) v. R. Leslie Deak, unrep., No. A2951 of 1987 (H.K.H.C. June 9, 1993), at 7.

248. *Id.* at 7-8.

Hong Kong; (2) that the Hong Kong Court of Appeal had considered Roethenmund's defense when granting leave to the Official Receiver to issue a concurrent writ; (3) that the Hong Kong Court of Appeal had found an arguable case; (4) that Roethenmund had never before claimed to be an affiliate; (5) that Roethenmund was the subject of third party proceedings, and (6) that the decision of the New York court was by default.²⁴⁹ Roethenmund then applied to strike out the Official Receiver's claim. He argued firstly that the Official Receiver's claim had been resolved by the valid, unchallenged settlement, and secondly that although the Official Receiver had challenged the applicability of the settlement to him, the New York court had decided that issue, thus barring its relitigation as *res judicata*.²⁵⁰

In resolving this dispute, the Hong Kong High Court held that the plaintiff's claim was barred by issue estoppel since "the parties [were] the same, the issue [was] the same, the judgment was conclusive and on the merits and . . . it was pronounced by a Court of competent jurisdiction."²⁵¹ The court found that since the Official Receiver had submitted to the jurisdiction of the U.S. bankruptcy court and since the judgments were final on the merits, he was bound by those judgments and could not challenge the defendant's defense based on the settlement.²⁵² The court also disposed of the Official Receiver's other arguments finding, *inter alia*, (1) that when the Hong Kong Court of Appeal had said that the Official Receiver had a good arguable case when applying for service of the concurrent writ in December 1990, Roethenmund had not yet obtained the judgment in the U.S. court and (2) that since the Official Receiver had reached a settlement with the U.S. Debtors in the sum of US\$2.36 million, he had suffered no loss.²⁵³ The Hong Kong court respected the U.S. ruling, thereby fostering cross-border cooperation, notably over the strong objections of the Official Receiver.

As discussed above, Hong Kong law does not provide for the application of foreign insolvency law in a Hong Kong winding up in aid of a primary insolvency proceeding abroad. Therefore, Hong Kong law does not allow for the development of a universality approach as fully as is possible under Section 304 of the U.S. Bankruptcy Code. However, close cross-border cooperation is still possible under what

249. *Id.* at 8-9.

250. *Id.* at 8.

251. *Id.* at 11 (applying the three requirements from *The Sennar* (No. 2) [1985] 1 W.L.R. 490).

252. *Id.*

253. *Id.* at 11-12, 15.

may best be characterized as a universality/plurality approach—either through an ancillary winding up, as in *Irish Shipping*, or through a full-scale concurrent insolvency, as in the insolvency involving Deak Perera (Far East) Ltd.

At present, most of the Hong Kong principles regarding transnational insolvency have developed in the case law. It would be beneficial for Hong Kong, especially with 1997 approaching, if many of these principles were incorporated into the H.K. Companies Ordinance. Greater consistency and predictability in the application of these principles would thereby most likely result. For example, as noted earlier, definitions of “foreign representative” and “foreign proceeding” should be included. Moreover, it should be made explicit that a foreign representative may petition in Hong Kong for the winding up of the foreign company that she represents, or whose estate she represents, in the foreign proceeding—provided she is so authorized under foreign law. Jurisdictional requirements regarding the foreign company’s connection with Hong Kong should also be enacted and should clarify the scope of the presence of assets test.

In addition, Part X of the H.K. Companies Ordinance should be reviewed and updated, and perhaps retitled. A definition of “foreign company” should be included in Part X, either as a sub-division of the definition of “unregistered company” or as a separate term. The need to retain Section 327A in its current form should also be addressed. In addition, “obsolete references” in the provisions regarding unregistered companies should be repealed, as has occurred in the United Kingdom,²⁵⁴ and the inconsistency between Sections 327(1) and 331 should be eliminated.

Other provisions could be enacted in Part X to codify aspects of the distinction between ancillary liquidations and other types of concurrent liquidations urged here. These sections or other new sections should also include a list of the criteria to be considered by a Hong Kong court before granting assistance to a foreign insolvency, as well as a list of the types of assistance that a court may order.

254. See L.S. SEALY & DAVID MILMAN, ANNOTATED GUIDE TO THE 1986 INSOLVENCY LEGISLATION, note to U.K. Insolvency Act 1986 § 220, at 242 (2nd ed. 1988) (discussing some of the “obsolete references” that have been repealed).

3. Reorganization

Under Hong Kong law, a company may be reorganized or restructured, whether or not it is being wound up.²⁵⁵ Pursuant to Section 166 of the H.K. Companies Ordinance, a liquidator has the power to propose a compromise or arrangement²⁵⁶ between the company and its creditors or shareholders.²⁵⁷ The proposals must be voted on by the various classes of creditors and/or shareholders.²⁵⁸ For a compromise or arrangement to be binding on each class of creditors it must be accepted by three-fourths in value of the creditors who are present and voting, and then be sanctioned by the court.²⁵⁹

Restructurings rarely occur in Hong Kong for a number of reasons. Most importantly, secured creditors, in effect, retain veto power over the restructuring process, because there is no mechanism to compel unwilling secured creditors to agree to a modification of their rights.²⁶⁰ Moreover, secured creditors may act independently in regards to their security at any time during a restructuring, whether or not the company is in liquidation.²⁶¹ In addition, unless the company is in liquidation, unsecured creditors may bring actions against the company and even commence executions against the company's as-

255. See REPORT OF THE REVIEW COMMITTEE ON INSOLVENCY LAW AND PRACTICE IN THE UNITED KINGDOM [United Kingdom, Cmnd. 8558, June 1982], under the Chairmanship of Sir Kenneth Cork, GBE, ¶¶ 400-04, at 97-98 [hereinafter the CORK REPORT].

256. A "compromise" involves accommodation by both parties, but not "total surrender." GEOFFREY MORSE, CHARLESWORTH & MORSE COMPANY LAW 840 (14th ed. 1991). The word "arrangement" similarly "implies some element of give and take," *id.*, but has a broader meaning than the word "compromise" and may involve the following, for example: debenture holders extending the time for payment, accepting a cash payment for less than the face value of their debentures, giving up their security, exchanging their debentures for company shares, or agreeing to vary their rights in some other way; creditors agreeing to take cash in part payment of their claims and the balance in company shares; or preference shareholders accepting a reduced rate of dividend, *id.* at 839-40.

257. Sections 237 and 254 of the H.K. Companies Ordinance are also relevant, but are rarely used. See CORK REPORT, *supra* note 255, ¶¶ 402-03, at 97-98. See also H.K. Company Ordinance § 199(1)(e) & (f) (providing that a liquidator in a compulsory winding up shall have the power with the sanction either of the court or of the committee of inspection to make any compromise or arrangement with creditors or to compromise with contributories). However, this section is not intended to be used as a mechanism to propose a scheme of arrangement among creditors generally. See CORK REPORT, *supra* note 255, ¶ 400, at 97.

258. H.K. Companies Ordinance § 166(1). See Stewart Smith, *Some Problems in Reorganising Insolvent Companies*, in LAW LECTURES FOR PRACTITIONERS 1983 227, 243 (Malcolm Merry ed. 1983).

259. H.K. Companies Ordinance § 166(2). See Smith, *supra* note 258, at 243. See generally *id.* for a discussion of restructurings under Hong Kong law.

260. CORK REPORT, *supra* note 255, ¶ 418, at 101; Smith, *supra* note 258, at 231.

261. See Smith, *supra* note 258, at 231-32.

sets.²⁶² Lastly, the matters involving the classification of creditors are very complex.²⁶³ In transnational insolvency cases even more problems may arise. Most importantly, foreign courts may refuse to recognize a Section 166 scheme to the extent that it attempts to modify or discharge contracts that are governed by non-Hong Kong law.²⁶⁴ To resolve this difficulty, schemes might need to be proposed in all affected jurisdictions.²⁶⁵

The issue of the effectiveness of a Section 166 scheme in a transnational insolvency almost arose in the recent insolvency of the Bank of Credit and Commerce (Hong Kong) Ltd. (BCCHK).²⁶⁶ On July 8, 1991, the Commissioner of Banking decided to close BCCHK,²⁶⁷ and on that same day the Hong Kong Governor in Council directed the Financial Secretary to present a petition to wind up the bank.²⁶⁸ Nine days later a winding up petition was filed under Section 53(1)(c)(iii) of the Hong Kong Banking Ordinance.²⁶⁹

The Official Receiver was appointed as the provisional liquidator and the liquidation hearing was postponed to allow time to find a buyer.²⁷⁰ On September 1, 1991, the Hong Kong Chinese Bank (HKCB), a subsidiary of Indonesia's Lippo Group, indicated its intention to take over BCCHK. However, several months later HKCB withdrew its bid after discovering massive unrecorded liabilities and learning that the Abu Dhabi and Hong Kong governments would not guarantee the unrecorded liabilities.²⁷¹ If HKCB had purchased BCCHK, the approval of creditors under Section 166 of the H.K. Companies Ordinance would have been required. If such a Section 166 scheme had attempted to modify or discharge any debts arising under foreign law, important cross-border insolvency issues would have arisen. Instead, on March 2, 1992, the Hong Kong High Court ordered the winding up of BCCHK.²⁷²

262. *Id.* at 244-45. See also CORK REPORT, *supra* note 255, ¶ 406, at 98.

263. Smith, *supra* note 258, at 245-47.

264. *Id.* at 250; Smart, *supra* note 201, at 145.

265. See Smart, *supra* note 201, at 145.

266. *Id.* at 144-45.

267. Report by the Commissioner of Banking to HE The Governor, July 30, 1991, ¶ 36, at 13-14.

268. *Id.* ¶ 38, at 14-15.

269. 1994, cap. 155, Laws of Hong Kong. See D.K. Srivastava, *The Collapse of the Bank of Credit and Commerce Hong Kong: Internal Failure or System Failure*, 1 AUSTRALIAN J. CORP. L. 170, 172 (1991).

270. Srivastava, *supra* note 269, at 172.

271. *Id.*

272. *Id.* During the winding up of BCCHK, for reasons of economy and efficiency in administration, a scheme of arrangement without any transnational insolvency implications was pro-

4. Bankruptcy

Because the Hong Kong courts do not recognize the principle of the "unity of bankruptcy," Hong Kong courts have jurisdiction to adjudicate a debtor bankrupt in Hong Kong even though the debtor has already been adjudicated bankrupt abroad.²⁷³ However, given that a vesting order operates to vest movable property in Hong Kong in the foreign trustee (provided the foreign law extends to movable property in Hong Kong), it will be rare for a foreign trustee to want to commence a bankruptcy in Hong Kong against the foreign debtor. To the extent that the foreign vesting order extends to movable property in Hong Kong, the foreign trustee will be able to claim a foreign debtor's property that is not subject to any pre-existing attachment, execution, or valid charge.²⁷⁴ Similarly, a foreign trustee may be able to be appointed as receiver of the debtor's immovable property in Hong Kong.²⁷⁵ Nevertheless, at times a foreign trustee might find it worthwhile to have a bankruptcy proceeding in Hong Kong commenced against the foreign individual, such as (1) to reach immovable property not otherwise obtainable, (2) to avoid uncompleted attachments

posed under § 166 of the H.K. Companies Ordinance to pay in full the claims of all unsecured creditors who were owed less than HK\$100,000. These creditors accounted for approximately 30,000 of the 35,000 unsecured creditors, although their claims accounted for less than 3% of the total claims against BCCHK. BCCHK SCHEME OF ARRANGEMENT AND ATTACHED EXPLANATORY STATEMENT, Aug. 6, 1992. In September 1992, the scheme was approved by creditors and sanctioned by the Hong Kong High Court.

In September 1993, BCCHK was awarded judgment in New York allowing US\$25 million to be brought back to Hong Kong for distribution in the Hong Kong liquidation. Gren Manuel, *BCC HK Wins US\$25m Cash Ruling*, S. CHINA MORNING POST, Sept. 10, 1993 (Business Post), at 1.

Through March 1994, BCCHK's unsecured creditors owed less than HK\$100,000 received payment in full (pursuant to the scheme of arrangement) and unsecured creditors owed more than HK\$100,000 received four interim dividend payments equal to 64% of their claims. ANNUAL DEPARTMENTAL REPORT OF THE HONG KONG OFFICIAL RECEIVER 1993-1994, *supra* note 189, ¶ 3.11, at 9.

273. 2 DICEY AND MORRIS, *supra* note 83, Rule 163 & accompanying cmt., at 1161-62.

274. See *supra* notes 122-25 and accompanying text.

275. See *supra* note 128. When seeking such relief, the foreign representative should file an application for an order in aid. Prior to the enactment of the U.K. Insolvency Act 1985, statutory guidelines regarding orders in aid in bankruptcy cases were in effect in Hong Kong. These guidelines were set out in § 122 of the U.K. Bankruptcy Act 1914. See *supra* note 82. As noted earlier, § 122 made it easier for trustees from Commonwealth jurisdictions to gain the cooperation of bankruptcy courts in other Commonwealth jurisdictions. At present, given the absence of statutory authorization regarding cross-border cooperation, a Hong Kong court may continue to assist a foreign representative under the court's inherent jurisdiction. See *Re Kooperman* [1928] W.N. 101. According to the Official Receiver, although § 122 of the U.K. Bankruptcy Act 1914 has been repealed, it remains easier for trustees from Commonwealth jurisdictions to gain the assistance of the Hong Kong courts. See *supra* note 128.

or executions,²⁷⁶(3) to avoid certain settlements²⁷⁷ or fraudulent preferences,²⁷⁸ (4) to enable the trustee to seek the application of broad investigative powers,²⁷⁹ or (5) to gain the benefit of the stay.²⁸⁰ However, as in liquidation, the stay does not prevent secured creditors from realizing or otherwise dealing with their security.²⁸¹ Commencing a bankruptcy proceeding would also enable a trustee to gain the benefit of the relation back doctrine.²⁸²

Hong Kong bankruptcy law still adopts the notion that for a bankruptcy proceeding to be commenced, a debtor must first commit an "act of bankruptcy." Section 3(1) of the H.K. Bankruptcy Ordinance specifies eight ways that a debtor can commit an act of bankruptcy, which, in abbreviated form, include the following: (1) making a conveyance of his property to a trustee for the benefit of his creditors generally;²⁸³ (2) making a fraudulent conveyance of his property;²⁸⁴ (3) making a fraudulent preference;²⁸⁵ (4) with intent to defeat or delay his creditors, departing from Hong Kong, or being out of Hong Kong remaining out of Hong Kong, or departing from his dwelling-house or usual place of business, or otherwise absenting himself, or beginning to keep house, or removing his property or any part thereof beyond the jurisdiction of the court;²⁸⁶ (5) having execution levied

276. H.K. Bankruptcy Ordinance § 45. In bankruptcy, to retain the benefit of an execution or attachment, a creditor must complete the execution or attachment before the date of the receiving order (*see infra* notes 302 and 303 and accompanying text) and before notice of the filing of the bankruptcy petition or of the commission of an available act of bankruptcy (*see infra* notes 283-290 and accompanying text).

277. *Id.* § 47.

278. *Id.* § 49. *See supra* notes 174-75.

279. H.K. Bankruptcy Ordinance § 29.

280. After the presentation of a bankruptcy petition, the court *may* stay any action, execution, or other legal process. H.K. Bankruptcy Ordinance § 14. After the making of a receiving order, no creditor with a provable debt in the debtor's bankruptcy shall have any remedy against the debtor or the debtor's property in respect of the debt, or shall commence any action or other legal proceeding, except by leave of the court. *Id.* § 12(1).

281. *Id.* § 12(2).

282. *Id.* § 42. This doctrine "provides for the relation back of the trustee's title to property [of the bankrupt] to the time of the act of bankruptcy on which a receiving order is made or [to the time of the first act of bankruptcy within] a period of up to three months before the presentation of the bankruptcy petition if there has been more than one act of bankruptcy." CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 15.01, at 125. *See also id.* §§ 15.02-.03, at 125-26.

283. H.K. Bankruptcy Ordinance § 3(1)(a).

284. *Id.* § 3(1)(b).

285. *Id.* § 3(1)(c).

286. *Id.* § 3(1)(d). *See* Chan Yue Shan (1908) 4 H.K.L.R. 128, 133 (noting that acts of bankruptcy committed outside Hong Kong, such as the act of being out of Hong Kong and remaining out of Hong Kong (which was included in § 4(1)(d) of the Bankruptcy Ordinance No. 20 of 1891 [hereinafter the H.K. Bankruptcy Ordinance 1891], was renumbered as § 3(1)(d), revised edi-

against him and having the goods subject to execution either sold or held by the bailiff for 21 days;²⁸⁷ (6) filing in court a declaration of his inability to pay his debts or presenting a bankruptcy petition against himself;²⁸⁸ (7) failing to comply with a bankruptcy notice issued under Section 4 of the H.K. Bankruptcy Ordinance;²⁸⁹ and (8) giving notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts.²⁹⁰

The concept of "acts of bankruptcy" is premised on the belief that certain types of wrongful conduct by the debtor, rather than the mere "financial embarrassment" of the debtor, should trigger a bankruptcy proceeding.²⁹¹ However, in practice, approximately 95% of bankruptcy cases commenced in Hong Kong are based on the noncompliance by the debtor with a bankruptcy notice.²⁹² Currently, the bankruptcy notice is only available to judgment creditors.²⁹³

The provisions regarding jurisdiction are somewhat confusing in that they require jurisdiction to exist at the time an act of bankruptcy occurs and, in the case of a creditor's petition, at the time the bankruptcy petition is filed or within a year preceding the date of filing. Section 3(2) of the H.K. Bankruptcy Ordinance provides that "a debtor" includes the following:

- any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—
- (a) was personally present in Hong Kong; or
- (b) ordinarily resided or had a place of residence in Hong Kong; or
- (c) was carrying on business in Hong Kong, personally or by means of an agent or manager; or

tion, and is presently included in § 3(1)(d) of the H.K. Bankruptcy Ordinance), are inapplicable to foreign debtors).

287. *Id.* § 3(1)(e).

288. *Id.* § 3(1)(f).

289. *Id.* § 3(1)(g).

290. *Id.* § 3(1)(h).

291. DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS AND MATERIALS ON BANKRUPTCY 27 (2d ed. 1990).

292. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 2.13, at 10. The Sub-Committee on Insolvency has proposed that the acts of bankruptcy should be abolished and replaced by the following four grounds: (1) failure of a debtor to comply with a bankruptcy notice; (2) the unsatisfied execution of a judgment against the property of a debtor; (3) the departure, or intention to depart, out of Hong Kong by a debtor knowing that a necessary consequence of his departure would be to defeat or delay his creditors, notwithstanding that his absence from Hong Kong had nothing to do with his debts; and (4) the default by a debtor under a form of voluntary arrangement. *Id.* §§ 2.10-23, at 10-13.

293. H.K. Bankruptcy Ordinance § 4. The Sub-Committee on Insolvency has recommended that a judgment should no longer be required for the issuance of a bankruptcy notice. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 2.15, at 11.

(d) was a member of a firm or partnership which carried on business in Hong Kong.²⁹⁴

Section 6(1), in turn, provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless

(d) the debtor is domiciled in Hong Kong, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in Hong Kong, or has carried on business in Hong Kong, personally or by means of an agent or manager, or is or within the said period has been a member of a firm or partnership of persons which has carried on business in Hong Kong by means of a partner or partners or an agent or manager.²⁹⁵

For a creditor to petition for the bankruptcy of a debtor, the creditor must also fulfill the other requirements in Section 6 of the H.K. Bankruptcy Ordinance; namely, that the debt owed by the debtor to the petitioning creditor (or creditors) amounts to more than HK\$5,000 and is liquidated and that the act of bankruptcy upon which the petition is grounded has occurred within three months of the filing of the petition.²⁹⁶

Current Hong Kong bankruptcy law explicitly provides for only a creditor or the debtor to file a bankruptcy petition.²⁹⁷ On its face, this

294. H.K. Bankruptcy Ordinance § 3(2).

295. *Id.* § 6(1). The Sub-Committee on Insolvency has recommended that the current jurisdictional criteria be replaced by a Hong Kong version of § 265 of the U.K. Insolvency Act 1986 as follows:

- (1) A bankruptcy petition shall not be presented to the court . . . unless the debtor—
 - (a) is domiciled in Hong Kong,
 - (b) is personally present in Hong Kong on the day on which the petition is presented, or
 - (c) at any time in the period of three years ending with that day—
 - (i) has been ordinarily resident, or has had a place of residence, in Hong Kong, or
 - (ii) has carried on business in Hong Kong.
- (2) The reference in sub-section (1)(c) to an individual carrying on business includes—
 - (a) the carrying on of business by a firm or partnership of which the individual is a member, and
 - (b) the carrying on of business by an agent or manager for the individual or for such a firm or partnership.

CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, §§ 3.07-08, at 16-17. The Sub-Committee on Insolvency has also proposed that an additional jurisdictional ground should be that the debtor either has, will have, or is likely to have, assets within Hong Kong by the time the bankruptcy order is made. *Id.* § 3.12, at 19.

296. H.K. Bankruptcy Ordinance § 6(1)(a), (b), (c).

297. *Id.* §§ 9-10. For a case involving a petition filed by a foreign debtor, see *Re Chan Yee Nam* (1918) 14 H.K.L.R. 1 (ordering that a receiving order be made in the case of a debtor who remained out of Hong Kong after (1) finding that there had not been an abuse of process; and (2) noting that § 8(1) of the H.K. Bankruptcy Ordinance 1891, which was applicable to a case commenced by a debtor's petition, stated that the court "shall" make a receiving order, unlike § 7(3) of the H.K. Bankruptcy Ordinance 1891, which was applicable to a case commenced by a

language would appear to exclude the filing of a petition in Hong Kong by a foreign representative against the foreign debtor whose estate she represents abroad. However, according to the Official Receiver, the practice in Hong Kong is to permit a foreign trustee to file a bankruptcy petition as a creditor of the foreign debtor.²⁹⁸ Thus, if a foreign representative wants to commence a bankruptcy in Hong Kong against a foreign debtor, she may file the petition herself as a creditor of the debtor, or convince a creditor or the debtor himself to

creditor's petition and used the word "may": the word "may" has been retained in current § 9(3) of the H.K. Bankruptcy Ordinance; although the word "shall" has been retained in current § 10(1) of the H.K. Bankruptcy Ordinance, an amendment made in 1986 gives the court the discretion not to make a receiving order if there is "sufficient cause for no order to be made"). For a case involving a petition filed by a creditor against a foreign debtor, see *Re Chan Yue Shan* (1908) 4 H.K.L.R., at 137-40 (interpreting applicable sections in the H.K. Bankruptcy Ordinance 1891, revised edition, some of which have been incorporated into current law and some of which have not). See *infra* note 299.

The Hong Kong High Court also has jurisdiction over bankruptcy cases. H.K. Bankruptcy Ordinance § 2. Petitions that are unopposed may be heard by the Registrar of the Supreme Court sitting in open court. *Id.* § 99(3)(a).

298. There is conflicting case law regarding the ability of a trustee to file a bankruptcy petition as a creditor of the debtor. In support of the proposition, see *Hutcheson v. Taylor* [1931] Scots L. Times, 356, 360-61. But see the Canadian case, *Re Eades Estate* [1917] W.W.R. 65, 90 (stating that the official receiver "is not a creditor of the bankrupt, either in his own right, or as trustee for the creditors.").

Interestingly, § 218 of the United Kingdom Bankruptcy Act 1861 explicitly enabled a foreign representative to commence a bankruptcy abroad as follows:

If any Person who shall have been duly adjudged or declared bankrupt or insolvent in India, or any of the Foreign Dominions, Plantations, or Colonies of Her Majesty, shall be resident or shall be possessed of Property in England, Ireland, or Scotland, or in any Colony, Plantation, or Foreign Possession of the Crown, it shall be lawful for the Assignee, Trustee, or other Representative of the Creditors of such Bankrupt or Insolvent to apply for and obtain an Adjudication of Bankruptcy, Sequestration, or Insolvency against such Person in the Court of Bankruptcy in England, and in the proper Court in Scotland, Ireland, and such Colony, Plantation, or Foreign Possession of the Crown respectively, and by virtue thereof the same Order and Disposition shall be had and taken with respect to the Person and Property of the Bankrupt or Insolvent, as would have been if he had been originally adjudged bankrupt or insolvent by the Court or Tribunal so applied to.

United Kingdom Bankruptcy Act, 1861, 24 & 25 Vict., ch. 134 (emphasis omitted). Under this provision, the foreign representative did not have to give proof of any act of bankruptcy or petitioning creditor's debt. *Id.* (I am grateful to Philip Smart for bringing § 218 and the two cases noted above to my attention.).

Section 218 was eventually replaced by § 122 of the U.K. Bankruptcy Act 1914. See *supra* note 82. Section 122 broadened the principles of prior § 218 through the notion of acting in aid, but deleted the explicit authorization for a foreign representative to commence a bankruptcy case elsewhere. As noted in *supra* note 82, § 122 of the U.K. Bankruptcy Act 1914 has been replaced by subsections in § 426 of the U.K. Insolvency Act 1986. Section 426(5) has been interpreted as enabling a foreign representative to request the commencement of an insolvency case in the United Kingdom without having to fulfill the jurisdictional criteria. See *Re Dallhold Estates (U.K.) Pty Ltd.* [1992] B.C.C. 394, 398-99 (making an administration order in respect of a foreign company under § 426(5), which would not otherwise have been possible under § 8 of the U.K. Insolvency Act 1986).

file the petition. It would be better for the foreign representative to have the debtor file the petition, because when a creditor (which for these purposes would include the trustee as a creditor) files, it might prove difficult to meet the jurisdictional requirements of Section 6(1)(d) of the H.K. Bankruptcy Ordinance.²⁹⁹

The H.K. Bankruptcy Ordinance should be amended to explicitly authorize a foreign representative to commence bankruptcy proceedings against the individual or partnership whose estate she represents in the foreign proceeding. It would also facilitate the bringing of such a petition to make the presence of assets a sufficient jurisdictional criterion. The Sub-Committee on Insolvency has, in fact, proposed the latter change.³⁰⁰

When a bankruptcy is commenced in Hong Kong, a bankruptcy trustee (like a liquidator) is more independent than her U.S. counterpart, and there is less creditor participation than there is in a U.S. bankruptcy. The Official Receiver plays a role in every bankruptcy.³⁰¹ After the presentation of a bankruptcy petition, the court has discretion to make a receiving order for the protection of the estate.³⁰² If a receiving order is made, the Official Receiver is appointed as the receiver of the debtor's property.³⁰³ If an adjudication order follows,³⁰⁴

299. See Chan Yue Shan (1908) 4 H.K.L.R. 128 in which the court applied the jurisdictional criteria in § 6(1)(d) of the H.K. Bankruptcy Ordinance 1891 (renumbered as § 5(1)(d), revised edition), as amended by § 4 of Ordinance No. 2 of 1901, which were incorporated into current § 6(1)(d) of the H.K. Bankruptcy Ordinance. The court held that a Chinese trader from Annam (formerly part of French Indochina, now part of present day Vietnam) was not domiciled in Hong Kong, *id.* at 133, and within a year of the filing of the petition did not have a dwelling-house or ordinarily reside in Hong Kong, but did have a place of business there, *id.* at 134-37. In a later decision, the court considered the application of § 3(c) of Ordinance No. 6 of 1902 [hereinafter the H.K. Bankruptcy Amendment Ordinance 1902], which is not retained in current law. See *id.* at 138-40. The court also held that it was legitimate to exercise bankruptcy jurisdiction over non-resident foreign debtors and that all of the extra-territorial provisions in the H.K. Bankruptcy Ordinance 1891, revised edition, including the H.K. Bankruptcy Amendment Ordinance 1902, were *intra vires*. *Id.* at 140-43.

300. See *supra* note 295.

301. The Sub-Committee on Insolvency has proposed that the role of the Official Receiver should even be increased. See *infra* notes 418-29 and accompanying text.

302. H.K. Bankruptcy Ordinance § 5. At the hearing of a bankruptcy petition, the court will usually make a receiving order if the debtor claims that he cannot pay the debt on which the petition is based. If the debtor claims that he is able to pay, then the court will usually adjourn the hearing to a later date to enable the debtor to pay. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 6.01, at 33.

At any time after the presentation of the petition and before the making of a receiving order, the court may also appoint the Official Receiver as an interim receiver of the debtor's property. H.K. Bankruptcy Ordinance § 13.

303. H.K. Bankruptcy Ordinance § 12(1). The receiving order does not, however, make the debtor a bankrupt. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 6.02, at 33.

which occurs in the majority of cases,³⁰⁵ the Official Receiver is almost always chosen to serve as the trustee;³⁰⁶ since 1959 there have only been four cases in which the Official Receiver has not been appointed trustee.³⁰⁷ Although discharge is theoretically available to bankrupts, the Sub-Committee on Insolvency has noted "that for the overwhelming majority of bankrupts bankruptcy is a life sentence."³⁰⁸

Under its inherent jurisdiction, the court has the discretion to dismiss any bankruptcy petition, and under Section 9(3) of the H.K. Bankruptcy Ordinance, the discretion to dismiss a creditor's petition.³⁰⁹ The court also has the discretion under Section 100(2) to adjourn any proceedings before it, and under Section 104 to stay bankruptcy proceedings permanently or for a limited time. This power to stay proceedings is rarely exercised.³¹⁰ In the unusual event that a bankruptcy is brought in Hong Kong against a debtor who has been adjudicated bankrupt abroad, the more likely scenario would be for there to be a concurrent bankruptcy in Hong Kong.³¹¹ All Hong

304. H.K. Bankruptcy Ordinance § 22(1). It is the adjudication order that adjudges the debtor bankrupt, and it is at that moment that the property of the bankrupt vests in the trustee. *Id.* § 58(1).

305. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 6.08, at 34 (noting that it is rare for a debtor to settle his debts after the making of a receiving order). See also H.K. Bankruptcy Ordinance §§ 20-21 (compositions and schemes of arrangement); CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 7.02, at 38, §§ 7.08-11, at 42-43. Of the 294 bankruptcy cases in 1991-92 in which a receiving order was made, an adjudication order followed in 262 cases. ANNUAL DEPARTMENTAL REPORT OF THE HONG KONG REGISTRAR GENERAL, 1991-92, ¶ 108, at 40.

306. See H.K. Bankruptcy Ordinance § 23 (appointment of trustee). This will be even truer under the Sub-Committee on Insolvency's proposals, pursuant to which the two-step bankruptcy procedure consisting of a receiving order and an adjudication order will be replaced by a one-step process consisting of a bankruptcy order only. Under this new scheme, the Official Receiver will have the discretion whether to serve as the trustee. See CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, chapter 6, at 33-37, chapter 9, at 60-65; text accompanying *infra* notes 418-19.

307. ANNUAL DEPARTMENTAL REPORT OF THE HONG KONG REGISTRAR GENERAL, 1991-92, *supra* note 305, ¶ 108, at 40.

308. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 18.01, at 150. See H.K. Bankruptcy Ordinance § 30 (discharge provision). The Sub-Committee on Insolvency has proposed that the discharge provisions be liberalized and that an automatic discharge be adopted in the majority of cases. See CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, chapter 18, at 150-74.

309. H.K. Bankruptcy Ordinance § 9(3). Under Section 10(1) of the H.K. Bankruptcy Ordinance, the court also has the discretion not to make a receiving order in a case commenced by a debtor's petition. See *supra* note 297.

310. SMART, *supra* note 34, at 34. See also *id.* at 43-55.

311. See *id.*, chapter 11, at 213-17. See also *id.*, at 218-20 (discussing the vesting of property in concurrent bankruptcies). The Privy Council case of *Lyll v. Jardine, Matheson, & Co.* (1870) L.R. 3 P.C.H.K. 319 is also of interest. This case involved a partnership that carried on business in London and Hong Kong. The Privy Council held that a bankruptcy adjudication against a

Kong claims could be settled in these proceedings, or alternatively, the Hong Kong court could approve a scheme of arrangement agreed upon by the Hong Kong bankruptcy trustee and the foreign representative for a pooling of the debtor's assets and a ratable distribution among creditors generally.³¹²

Although the Hong Kong courts have the discretion to issue turn-over orders in concurrent bankruptcies,³¹³ the term "ancillary bankruptcies" is not generally used to describe a bankruptcy in which such cooperation occurs. As noted above, I believe that the term is appropriate and conceive of a continuum of types of concurrent bankruptcies under a universality/plurality approach that runs from an "ancillary bankruptcy," where the aim is to assist the foreign trustee, to a full-scale concurrent bankruptcy, where the Hong Kong trustee and the foreign trustee are on equal footing.³¹⁴ If Hong Kong enacts a jurisdictional ground based on the presence of assets,³¹⁵ more cases will very likely arise in which an ancillary bankruptcy will be appropriate.

The administration of transnational bankruptcy cases would be improved if changes were made to the H.K. Bankruptcy Ordinance that are similar to the reforms recommended in Part IV.C.2. above for enactment in the companies legislation. For example, the H.K. Bankruptcy Ordinance should be amended to include definitions of "foreign representative" and "foreign proceeding." The ordinance should also provide for the filing of a bankruptcy petition in Hong Kong against a debtor by a foreign representative whose estate she represents in the foreign proceeding, provided the foreign representative is so authorized under foreign law. Other provisions could be enacted to codify aspects of the distinction between ancillary bankruptcies and other concurrent bankruptcies. These sections or other sections should also include guidelines for a court to consider when determining whether to grant assistance to foreign bankruptcies, as well as a list of the types of assistance that a Hong Kong court may order.

partner of the firm resident in England would not prevent the subsequent joint bankruptcy adjudication against the firm in Hong Kong. *Id.* at 330-31.

312. See SMART, *supra* note 34, at 214-15, 220. See also Woloniecki, *supra* note 83, at 661-62.

313. See SMART, *supra* note 34, at 216-17.

314. See text accompanying *supra* note 239. Local law, rather than foreign law, would be applicable in both ancillary and concurrent bankruptcies.

315. See *supra* note 295.

V. ABILITY OF HONG KONG TRUSTEES AND LIQUIDATORS TO SEEK CROSS-BORDER ASSISTANCE IN TRANSNATIONAL INSOLVENCIES AND THE TREATMENT OF HONG KONG INSOLVENCIES BY COURTS IN THE UNITED STATES AND CHINA

A. *Ability of Hong Kong Trustees and Liquidators to Seek Cross-Border Assistance in Transnational Insolvencies*

Hong Kong bankruptcy law adopts the universality approach in defining the property that vests in a trustee appointed in a bankruptcy in Hong Kong. Section 43(i) of the H.K. Bankruptcy Ordinance provides that the property of the debtor divisible among his creditors includes "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before his discharge." Section 58 of the H.K. Bankruptcy Ordinance, in turn, provides that immediately upon a debtor being adjudged bankrupt, the property of the bankrupt vests in the trustee.³¹⁶ Finally, Section 2 of the H.K. Bankruptcy Ordinance defines "property" expansively as including "money, goods, things in action, land and every description of property, whether real or personal and *whether situate in Hong Kong or elsewhere*."³¹⁷ Thus, Hong Kong law seeks to vest immovable property abroad in Hong Kong trustees, though Hong Kong will not recognize the effect of a foreign vesting order on immovable property located in Hong Kong.³¹⁸ Of course, although Hong Kong law provides that a trustee's title extends to property abroad, whether or not such property actually will pass to

316. See also H.K. Bankruptcy Ordinance § 42 (providing for the relation back of the trustee's title).

317. (Emphasis added). The language quoted above was also part of the definition of "property" in § 3 of the H.K. Bankruptcy Ordinance 1891. As noted in *supra* note 299, the court in *Chan Yue Shan* (1908) 4 H.K.L.R. 128, 140-43, held that all of the extra-territorial provisions in the 1891 Ordinance, revised edition, were *intra vires*.

U.S. bankruptcy law also adopts the universality approach in defining the property in the debtor's estate. Section 541 of the U.S. Bankruptcy Code specifies that property of the estate is compromised of property "wherever located and by whomever held." 11 U.S.C. § 541(a) (1994). See *In Re McLean Indus.*, 74 B.R. 589, 592 (Bankr. S.D.N.Y. 1987) (claiming that Hong Kong should recognize and grant comity to the U.S. bankruptcy proceedings in question and to the stay ordered by the U.S. bankruptcy court and provided by § 362 of the U.S. Bankruptcy Code).

318. See 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 164, at 1163; *supra* notes 120-125 and accompanying text. However, the Hong Kong courts would consider appointing a foreign trustee as an auxiliary receiver with the power to sell the property and distribute the proceeds. See *supra* note 128 and accompanying text.

the Hong Kong trustee "must depend in the last resort on the *lex situs*."³¹⁹

In regard to the extraterritorial jurisdiction of Hong Kong liquidations, the H.K. Companies Ordinance is silent.³²⁰ However, it is clear from the decision in the Hong Kong case of *American Express International Banking Corp. v. Johnson* ("*American Express*")³²¹ that a Hong Kong liquidator may go abroad to protect the overseas property of a company being wound up in Hong Kong.³²² In the court's view, a liquidator may commence insolvency proceedings abroad for that purpose, but should first take legal advice and must seek judicial approval, as the liquidators in *American Express* had done.³²³

The more difficult issue in *American Express* was whether Section 269 of the H.K. Companies Ordinance, which governs the avoidance of uncompleted attachments and executions, has extraterritorial effect. Several U.S. creditors sought (1) declaratory relief that they were entitled under Hong Kong law to retain the benefits of their U.S. attachments and (2) a ruling that the Hong Kong liquidators should withdraw the Chapter 7 liquidation that they had commenced under Section 303(b)(4) of the U.S. Bankruptcy Code against Axona International Credit and Commerce Ltd.³²⁴

The U.S. creditors asserted that Section 269 of the H.K. Companies Ordinance governed their attachments in the United States. They contended that they should be able to retain the benefit of their attachments, since they had received actual payment of their debts, and had thereby completed their attachments before the commencement of the liquidation in Hong Kong.³²⁵ The Hong Kong liquidators and the Official Receiver argued, in contrast, as follows: the H.K. Compa-

319. 2 DICEY AND MORRIS, *supra* note 83, cmt. to Rule 164, at 1164. Section 55 of the H.K. Bankruptcy Ordinance was enacted in 1984 to assist trustees in their handling of property overseas. Section 55 provides as follows:

Where the bankrupt is possessed of any property out of Hong Kong, the trustee shall require him to join in selling the same for the benefit of the creditors and to sign all necessary authorities, powers, deeds and documents for the purpose, and if and so often as the bankrupt refuses to do so he may be punished for a contempt of court.

320. The H.K. Companies Ordinance should be amended to clarify the effect that Hong Kong liquidations are intended to have on property located abroad.

321. [1984] H.K.L.R. 372 [hereinafter *American Express*].

322. *Id.* at 378, 382-83.

323. *Id.* at 379-80. The court also noted that the liquidators had acted with the authority of the committee of inspection. *Id.* at 379. Thus, the liquidators had not committed misfeasance or breached their duty as officers of the court. *Id.* at 380.

324. *Id.* at 378-79.

325. *Id.* at 380-81. See H.K. Companies Ordinance § 269. See also *supra* note 172 and accompanying text.

nies Ordinance "is a domestic code. It governs domestic executions against goods and lands within the jurisdiction of the court, or attachments which have occurred in Hong Kong, and does not extend to matters . . . outside the jurisdiction of this court. Such matters . . . are governed . . . by the *lex situs*" ³²⁶ The court favored the latter submission and stated:

There is nothing whatever in the [H.K.] Companies Ordinance to suggest that the legislature in Hong Kong, adopting in this respect (with modification) parliamentary legislation from the United Kingdom, was intending any of the words used to extend or operate beyond the jurisdiction of this court. On the contrary, if you look at the words used, all the indications are against it. ³²⁷

The court noted that in relation to executions against goods or land or attachments of debts, "[o]ne thing which is plain as a pike staff is that there is no suggestion that the Hong Kong Court here can exercise jurisdiction over land, under any principle, outside the jurisdiction of this court." ³²⁸ The court did note that the definition of property in Section 2 of the H.K. Bankruptcy Ordinance expressly applies "to property anywhere," but then added that "that is the only extended meaning given to any term in the corresponding bankruptcy provisions. So, the direct application of normal principles of construction, leads one to the conclusion that this is a domestic code." ³²⁹ In the court's view, therefore, Section 269 of the H.K. Companies Ordinance does not govern transactions abroad; rather, those matters arising in liquidations involving executions and attachments are to be decided by the *lex situs* of the property in question. ³³⁰

The court also rejected the creditors' contention that the Hong Kong liquidators should have commenced a case under Section 304 of the U.S. Bankruptcy Code, which would have made it impossible to avoid the preferences in the United States. ³³¹ Therefore, the court refused to order that the Chapter 7 proceedings commenced in the United States under Section 303(b)(4) should be withdrawn. ³³²

326. *American Express* [1984] H.K.L.R. at 381.

327. *Id.* at 384. See also *id.* at 383.

328. *Id.* at 384.

329. *Id.*

330. *Id.* at 381-85. The court added in *obiter* that questions of preference in insolvency should also be decided by the *lex situs*. *Id.* at 382. The related question of how these matters should be resolved in the context of bankruptcy has not yet been addressed by the Hong Kong courts. It would be helpful if the insolvency legislation were amended to clarify whether the avoidance powers are to have extraterritorial effect.

331. *Id.* at 385-88.

332. *Id.* at 388.

Of course, if the actions or proceedings commenced abroad prove successful, the Hong Kong liquidator may return to Hong Kong with the foreign assets, if so ordered by the foreign court, and distribute them under Hong Kong law. This was the result reached in the U.S. bankruptcy case of *In-re Axona International Credit and Commerce Ltd.*³³³

B. Treatment of Hong Kong Insolvencies by U.S. Courts

As noted above, it is clear that Hong Kong law provides for the title of a bankruptcy trustee to extend to property abroad. Similarly, it is clear that a Hong Kong liquidator may seek judicial assistance abroad to protect the overseas assets of a company being wound up in Hong Kong. However, it is a separate matter whether the foreign courts will be receptive to the claims of a Hong Kong representative. This matter may be resolved by multilateral or bilateral treaties, and in the absence of treaties, by reference to the law of the jurisdiction in which recognition is sought. To date, Hong Kong is not a member of any international convention regarding the recognition of cross-border insolvencies.

Although Hong Kong and England have not entered into a reciprocal agreement, England has unilaterally provided for the recognition of Hong Kong insolvencies through the enactment of Section 426(4) of the U.K. Insolvency Act 1986 (co-operation between courts exercising jurisdiction in relation to insolvency). This section states that "[t]he courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory."³³⁴ Section 426(11)(b) of the U.K. Insolvency Act 1986, in turn, specifies that "relevant country or territory means any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument."³³⁵ In 1986 the Secretary of State of England specified that Hong Kong is a relevant territory.³³⁶ Thus, in a case involving a re-

333. 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991). See text accompanying *infra* notes 350-78.

334. U.K. Insolvency Act 1986 § 426(4). For further analysis of § 426, see SMART, *supra* note 34, at 259-64. See also FLETCHER, *supra* note 17; Woloniecki, *supra* note 83, at 648-63. Section 426 replaced § 122 of the U.K. Bankruptcy Act 1914. Until its repeal in 1985, § 122 provided for bankruptcy courts throughout the Commonwealth to assist each other. See *supra* note 82.

335. U.K. Insolvency Act 1986 § 426(11)(b).

336. United Kingdom Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, S.I. 1986, No. 2123.

quest made to a court in the United Kingdom by a Hong Kong liquidator or trustee, the United Kingdom court "shall" assist the Hong Kong court.³³⁷

In gaining recognition elsewhere, Hong Kong liquidators and trustees have to rely on the application of the law in the jurisdiction in which they are seeking recognition. To date, there have been only two reported U.S. cases involving the recognition of Hong Kong insolvencies by U.S. courts: *In re Axona International Credit & Commerce Ltd.* ("Axona")³³⁸ and *In re Chingman Chan*.³³⁹

Axona involved the liquidation of the U.S. assets of Axona International Credit and Commerce Ltd. ("Axona"), a company concurrently being wound up in Hong Kong.³⁴⁰ Axona was a registered deposit-taking company that carried on business in Hong Kong. It did not engage in the banking business in the United States, but did have substantial cash deposits in several banks located there. When Axona was unable to pay its debts as they became due in November 1992, its creditors began to grab its assets. Three U.S. banks obtained *ex parte* attachments on Axona's U.S. bank deposits that, under U.S. law, gave them a priority over other creditors.³⁴¹ A fourth creditor, Chemical

337. U.K. Insolvency Act 1986 § 426(4). Under § 426(5) of the U.K. legislation the English court would have discretion to apply either English law or relevant Hong Kong law. See SMART, *supra* note 34, at 260, 263-64. In 1992 in the Hong Kong bankruptcy involving Keith Thomas Philcox, the Hong Kong Official Receiver made an application for an order in aid to the Hong Kong court for permission to request assistance of the English court. *Re Keith Thomas Philcox*, Bankruptcy No. 446 of 1986, Report to Court in Support of an Application for Leave to Commence Proceedings and an Application for an Order in Aid (H.K.H.C. Aug. 11, 1992), ¶ 15. On August 12, 1992, the Hong Kong High Court ordered that the aid of the English court be sought pursuant to § 426 of the U.K. Insolvency Act 1986. *Re Keith Thomas Philcox*, Order (H.K.H.C. Aug. 12, 1992). The next day, the English High Court of Justice, Chancery Division granted the relief requested by the Official Receiver, namely, appointing the Official Receiver as receiver of the bankrupt's real property in England, with the power to sell and deal with the proceeds of sale. *Official Receiver of Hong Kong v. Keith Thomas Philcox*, Ch. 1992 O. 6052, Order (H.C. Just., Ch. Div. Aug. 13, 1992).

338. 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991) [hereinafter *Axona*].

339. 1993 U.S. Dist. LEXIS 7864 (S.D.N.Y. June 9, 1993). See also *Scientex Corp. v. Harry Kay*, Memorandum of Decision and Order, CV82-0410-RJK (C.D. Cal. July 28, 1986) (for reasons of comity, dismissing a cross-claim against a company that was in the midst of liquidation in Hong Kong).

340. Much of the discussion that follows about *Axona* is drawn from Booth, *Recognition of Foreign Bankruptcies*, *supra* note 23, at 220-29, and from Charles D. Booth, Case Comment, *Transnational Insolvency: Cross-Border Co-operation Between the United States and Hong Kong—In re Axona International Credit and Commerce Limited*, 23 H.K.L.J. 131 (1993).

341. Section 9-301(3) of the Uniform Commercial Code defines a "lien creditor" as "a creditor who has acquired a lien on the property involved by attachment, levy, or the like." U.C.C. § 9-301 (1994). Under § 9-301(1)(b) a lien creditor has priority over an unperfected security interest. *Id.* § 9-301(1)(b).

Bank, executed other self-help actions, including the transfer of a cash collateral account from its Hong Kong branch to its main office in New York.

One of Axona's creditors commenced compulsory winding-up proceedings in Hong Kong against Axona on February 2, 1983. On February 4, the Hong Kong High Court appointed joint provisional liquidators, who acted quickly to protect Axona's property in the United States from the actions of U.S. creditors. The two primary alternatives available to them were (1) to commence an involuntary liquidation (Chapter 7) case against Axona under Section 303(b)(4) of the U.S. Bankruptcy Code or (2) to commence an ancillary case under Section 304 of the U.S. Bankruptcy Code.³⁴² After receiving proper authorization from the Hong Kong court, the provisional liquidators opted for the first alternative and commenced a Chapter 7 liquidation against Axona. They thereby gained the following benefits that, in their counsel's view, would not have been available in a Section 304 case: the application of the automatic stay against a broad variety of creditor actions;³⁴³ the availability of the U.S. Bankruptcy Code's avoidance powers;³⁴⁴ the availability of greater powers of investigation; and the need to commence only one action.³⁴⁵ On March 4, 1983, the Hong Kong court ordered the winding-up of Axona and appointed the provisional liquidators as permanent liquidators.

The attaching U.S. creditors soon commenced litigation in both the United States and Hong Kong, challenging the commencement of the Chapter 7 case by the Hong Kong liquidators. Over the objections of these creditors in the U.S. proceedings, the U.S. bankruptcy court entered the order for relief and allowed the U.S. liquidation to continue. Soon thereafter, a trustee was appointed in the U.S. case and he commenced adversary proceedings against the attaching U.S. creditors to set aside as preferences the funds obtained by the banks on account of their prepetition attachments.

In the Hong Kong proceedings, *American Express International Banking Corp. v. Johnson*,³⁴⁶ the U.S. creditors sought declaratory re-

342. See discussion of these two options in the text accompanying *supra* notes 29-52.

343. 11 U.S.C. § 362(a) (1994).

344. Most importantly, *id.* § 547. See *supra* note 47 and accompanying text.

345. Compare § 1408 and § 1410 of 28 U.S.C. (1994). These four factors are noted in *American Express* [1984] H.K.L.R. at 377. In counsel's view, these advantages outweighed the disadvantages of commencing a liquidation under Chapter 7, namely: (1) the loss of control by the Hong Kong liquidators over the U.S. estate; (2) greater administrative expenses; and (3) uncertainty as to how the U.S. court would act. *Id.*

346. [1984] H.K.L.R. 372.

lief that they were entitled under Hong Kong law to retain the benefits of their U.S. attachments and a ruling that the Hong Kong liquidators should withdraw the Chapter 7 proceedings in the United States. Before addressing these issues, the Hong Kong court questioned the motives of the U.S. creditors in commencing the Hong Kong actions. The court observed that U.S. preference law, unlike Hong Kong fraudulent preference law, does not require the court "to go into difficult questions of intention"³⁴⁷ and noted that "[h]aving no apparent defence" to the preference actions in the United States, the U.S. creditors "have launched into a massive counter-attack, a massive filibuster to prevent the New York Court from giving judgment in the adversary proceedings."³⁴⁸ Then, as noted above in part V.A., the Hong Kong court dismissed the creditors' applications, thereby allowing the Hong Kong liquidators to continue the U.S. Chapter 7 case and benefit from the more extensive avoidance powers available under U.S. law.

In the U.S. liquidation the U.S. trustee eventually entered into a settlement with the attaching creditors. The U.S. trustee also commenced a preference action against Chemical Bank to recover the transfers involved in the bank's self-help maneuvers of November 1992. This action was also settled.³⁴⁹ The U.S. trustee recovered more than US\$7 million from these settlements. In the meantime, the Hong Kong liquidators had recovered more than US\$5 million in the Hong Kong proceedings.

The Hong Kong liquidators and the U.S. trustee (the "Joint Applicants") then together filed an application under Section 305(b)³⁵⁰ of the U.S. Bankruptcy Code for the court to suspend the U.S. liquidation and order the transfer of the U.S. assets to the Hong Kong liquidators, to be administered in the Hong Kong winding up under Hong Kong law.

Under section 305(a)(2) of the U.S. Bankruptcy Code, a bankruptcy court may suspend a bankruptcy case if there is a foreign proceeding pending and the factors specified in Section 304(c) of the U.S. Bankruptcy Code warrant such suspension.³⁵¹ Section 304(c) provides that in cases involving corporate debtors, the court shall be guided by

347. *Id.* at 378. Compare 11 U.S.C. § 547 (1994) with H.K. Companies Ordinance § 266 and H.K. Bankruptcy Ordinance § 49. See *supra* notes 174-75.

348. *American Express* [1984] H.K.L.R. at 378.

349. The settlement agreement reserved Chemical Bank's right to contest the jurisdiction of the U.S. bankruptcy court to administer Axona's liquidation case. *Axona*, 88 B.R. at 602.

350. See 11 U.S.C. § 305 (1994), *supra* note 27.

351. See *id.*

what will best assure an economical and expeditious administration of the estate consistent with the following factors: just treatment of all creditors; protection of U.S. creditors against prejudice and inconvenience in the processing of their claims abroad; prevention of preferential or fraudulent dispositions of the property of the estate; distribution of proceeds of the estate substantially in accordance with the order prescribed by the U.S. Bankruptcy Code; and comity.³⁵²

Chemical Bank raised a variety of statutory, jurisdictional, and constitutional challenges and sought an "order dismissing the chapter 7 case and vacating *ab initio* all proceedings instituted therein."³⁵³ Chemical Bank wanted to circumvent the application of the U.S. avoidance powers and instead seek the application of Hong Kong law, which it believed was more favorable to its position.³⁵⁴ The U.S. bankruptcy court rejected all of Chemical Bank's arguments³⁵⁵ and granted the relief requested by the Joint Applicants, namely, suspending the Chapter 7 case and ordering the turnover of the U.S. assets to the Hong Kong liquidators to be distributed in the Hong Kong proceedings.³⁵⁶ In the context of the transnational aspects of Hong Kong insolvency law, the most important parts of the U.S. bankruptcy court decision are those that concern whether assistance should be granted to the Hong Kong winding up proceedings and, more particularly, the extent to which Hong Kong insolvency law and procedures satisfy the Section 304 criteria.

The *Axona* court first discussed the criterion of comity and adopted the broad pro-recognition comity approach of several earlier U.S. cross-border insolvency cases.³⁵⁷ The court quoted *In re Culmer*:³⁵⁸ "Comity is to be accorded a decision of a foreign court as long as that court is of competent jurisdiction and as long as the laws and public policy of the forum state are not violated."³⁵⁹ The court stated that "where the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, exceptions to the doc-

352. See 11 U.S.C. § 304 (1994), text accompanying *supra* note 36.

353. *Axona*, 88 B.R. at 598.

354. *Id.* at 603-04. The Joint Applicants disagreed with Chemical Bank's interpretation of Hong Kong law. See *id.* at 604 n.12.

355. The U.S. bankruptcy court was skeptical of the bank's motives: "Chemical's opposition, purporting to raise issues of first impression of constitutional dimension, bandies a smokescreen of dubitable arguments pitched to preserve the preferred posture Chemical obtained by virtue of its November 1982 machinations." *Id.* at 603.

356. *Id.* at 618.

357. *Id.* at 609-10.

358. 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

359. *Axona*, 88 B.R. at 609 (quoting *Culmer*, 25 B.R. at 629).

trine of comity are narrowly construed' ”³⁶⁰ and noted that U.S. courts had previously granted comity to three such sister common law jurisdictions:³⁶¹ the Bahamas,³⁶² the Cayman Islands,³⁶³ and Canada.³⁶⁴ The court then observed that Hong Kong, like these three other sister common law jurisdictions, has winding up law “derived from the British Companies Act.”³⁶⁵

The court then discussed a number of factors supporting its finding that the H.K. Companies Ordinance “is strikingly similar to the [U.S. Bankruptcy] Code and provides a comprehensive procedure for the orderly and equitable distribution of assets to all creditors.”³⁶⁶ The court noted the following factors: (1) liquidators are officers of the Hong Kong court and are subject to control by both the court and a committee of creditors;³⁶⁷ (2) the Official Receiver audits liquidators’ accounts bi-annually;³⁶⁸ (3) creditors are forbidden from suing a debtor after a winding up order is made, except by leave of court, and their remedies are limited to filing proofs of debt;³⁶⁹ (4) all post-petition dispositions of the debtor’s assets are deemed void unless otherwise ordered by the court;³⁷⁰ and (5) preferences and other fraudulent conveyances are subject to avoidance.³⁷¹ The U.S. bankruptcy court was therefore satisfied that comity should be accorded to the Hong Kong proceedings.

The court went on to find that the Hong Kong law and proceedings satisfied the other Section 304 criteria, as well. Section 304(c)(1), which requires that all creditors receive “just treatment,” was satisfied, because Hong Kong law, like U.S. law, “provides a comprehensive procedure for the orderly and just treatment of all Axona’s creditors.”³⁷² Moreover, the majority of Axona’s debts arose in Hong Kong, Axona’s books and records were located there as well, and the Hong Kong liquidators were best situated to consider creditors’ claims

360. *Id.* at 610 (quoting *In re Gee*, 53 B.R. 891, 901 (Bankr. S.D.N.Y. 1985), which cited *Clarkson Co. v. Shaheen*, 544 F.2d 624, 630 (2d Cir. 1976)).

361. *Id.* at 610.

362. *Culmer*, 25 B.R. 621.

363. *Gee*, 53 B.R. 891.

364. *Clarkson Co. v. Shaheen*, 544 F.2d 624.

365. *Axona*, 88 B.R. at 610.

366. *Id.*

367. *Id.* (citing H.K. Companies Ordinance §§ 195, 196(1), 200, 203, 204).

368. *Id.* (citing H.K. Companies Ordinance §§ 195(b), 202, 203).

369. *Id.* (citing H.K. Companies Ordinance § 186).

370. *Id.* (citing H.K. Companies Ordinance §§ 182, 184).

371. *Id.* (citing H.K. Companies Ordinance §§ 266, 269, 270).

372. *Id.* at 612.

fairly and at the lowest cost.³⁷³ Also, the court found that ordering the relief requested by the Joint Applicants would ensure an economical and expeditious handling of the case.³⁷⁴

In applying the Section 304(c)(2) requirement that U.S. creditors be protected against "prejudice and inconvenience in the processing, in such foreign proceeding," the court found that "Hong Kong law does not discriminate against creditors residing outside of Hong Kong."³⁷⁵ Also in regard to Section 304(c)(2), the court noted the appeal procedures available under Hong Kong law for creditors dissatisfied with the adjudication of their claims by a liquidator. In finding that the Section 304(c)(3) requirement regarding the prevention of preferential or fraudulent dispositions of property of the estate was also satisfied, the court considered that the Hong Kong liquidators had reviewed claims to insure that fraudulent preferences had not been committed under Hong Kong law.³⁷⁶ Lastly, the court found that the Hong Kong distribution scheme satisfied Section 304(c)(4).³⁷⁷

After finding that Hong Kong law satisfied the Section 304(c) criteria and disposing of Chemical Bank's other challenges, the *Axona* court granted the relief requested by the Joint Applicants. This was certainly the correct decision, especially given the fundamental fairness of Hong Kong insolvency law. Even Chemical Bank had not claimed that Hong Kong law was unfair. Rather, the bank had asserted that "it would be *unfairly* treated if the [U.S.] case were suspended and Hong Kong law utilized to govern the disposition of Axona's estate."³⁷⁸

Chemical Bank appealed, and in May 1990 the U.S. District Court for the Southern District of New York upheld the bankruptcy court's decision.³⁷⁹ Chemical Bank again appealed, and in January 1991 the Second Circuit Court of Appeals dismissed the appeal.³⁸⁰ Since the conclusion of the U.S. litigation, the Hong Kong liquidators have made two interim distributions to creditors amounting to 19½% of their claims. Both distributions were made in Hong Kong dollars, based on the rate of exchange prevailing on March 4, 1983, the date of

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 613 (citing H.K. Companies Ordinance § 264).

377. *Id.*

378. *Id.* at 612.

379. *In re Axona Int'l Credit & Commerce Ltd.*, 115 B.R. 442 (S.D.N.Y. 1990).

380. *In re Axona Int'l Credit & Commerce Ltd.*, 924 F.2d 31 (2d Cir. 1991).

the Hong Kong winding up order. It is expected that further distribution will be made to creditors in 1995.

Just a few months before the *Axona* bankruptcy court issued its decision, the Official Receiver of Hong Kong, who was serving as trustee of the estate of Chingman Chan, commenced a Section 304 case in the United States ancillary to Chingman Chan's bankruptcy proceedings in Hong Kong.³⁸¹ The Official Receiver wanted to assert title to real property that the debtor owned in New York³⁸² and to enjoin certain litigation in California that the Official Receiver believed involved the debtor.³⁸³ In May 1988 the bankruptcy court granted the Section 304 petition.³⁸⁴ As it appears that no litigation arose involving the granting of the petition or the ordering of relief, there is no reported decision discussing the application of either the Section 304 threshold requirements³⁸⁵ or the Section 304(c) criteria.³⁸⁶

The bankruptcy court denied the Official Receiver's request to stay the litigation involving two joint venture parties in California after finding that although Chingman Chan was a major shareholder in one of the joint venture parties, he himself was not a party to that

381. *In re Chan*, Case No. 88B10378 (Bankr. S.D.N.Y. 1988), Section 304 Petition [hereinafter "*Chan* Section 304 Petition"]. See also *In re Chingman Chan*, 1993 U.S. Dist. LEXIS 7864 (S.D.N.Y. June 9, 1993) 2-3.

382. *Chan* Section 304 Petition, *supra* note 381, ¶¶ 8, 11.

383. *Id.* ¶¶ 12-13.

384. *Chan*, U.S. Dist. LEXIS 7864, at 2-3.

385. Nevertheless, it is clear from the *Chan* Section 304 Petition (1) that the Official Receiver was a "foreign representative," *Chan* Section 304 Petition, *supra* note 381, ¶¶ 1, 7, 8, and was appointed in a "foreign proceeding," *id.* ¶¶ 2, 6, 8; (2) that the Official Receiver was empowered to seek control of the debtor's assets, *id.* ¶ 8 (although the petition does not state that the Official Receiver was explicitly authorized to commence a Section 304 case in the United States or that the definition of "property" in § 2 of the H.K. Bankruptcy Ordinance has extraterritorial effect); (3) that Chan qualifies as a debtor under Hong Kong law, *id.* ¶¶ 2, 6, 7; (4) that the debtor had assets in the United States and in the relevant district, *id.* ¶ 11; and (5) that venue properly lay, *id.* ¶ 5.

386. In the *Chan* Section 304 Petition there is some discussion of the criteria that a U.S. court would take into account in considering the § 304(c) criteria. *Id.* ¶ 10. However, more detail would be necessary to make as informed a decision as did the bankruptcy court in *Axona*. One interesting question not addressed in the *Chan* Section 304 Petition is whether Hong Kong bankruptcy law satisfies the § 304(c)(6) criterion of "the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns." Although it is true that § 30 of the H.K. Bankruptcy Ordinance provides the debtor with an opportunity to seek a discharge, "for the overwhelming majority of bankrupts bankruptcy is a life sentence." See *supra* note 308. For example, in the ten-year period from 1982 to 1991, less than 1% of all debtors who were adjudicated bankrupt were discharged. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 18.08, at 155. However, as mentioned earlier, the Sub-Committee on Insolvency has proposed that automatic discharge provisions be incorporated into law. See *id.*, chapter 18, at 150-74.

litigation.³⁸⁷ The court did, however, permit the Official Receiver to intervene in that action.³⁸⁸ Later, the bankruptcy court also approved the Official Receiver's request to compel the attorneys for the two joint venture parties to render their final accounting.³⁸⁹

As can be seen from the decisions in *Axona* and *Chingman Chan*, to date the U.S. courts have been receptive to requests from Hong Kong representatives to recognize Hong Kong insolvency proceedings. In addition, *Axona* demonstrates the high level of cooperation that is possible when Hong Kong representatives work closely with their foreign counterparts.

C. Treatment of Hong Kong Insolvencies by Chinese Courts

The Hong Kong representatives in *Axona* and *Chingman Chan* fared better in gaining recognition and assistance from the U.S. courts than did the Hong Kong liquidator in the case of *Liwan District Construction Company v. Euro-America China Property Limited* ("Liwan District Construction Co."),³⁹⁰ who was denied recognition by the Chinese court. This case involved a suit for breach of contract that was complicated by the fact that the Hong Kong defendant in the action was wound up in Hong Kong during the litigation.

In March 1987 the Hong Kong company, Euro-America Construction Company, entered into an agreement with the Guangzhou Liwan District Headquarters for Construction with Foreign Investment for the development of two new towns. These parties respectively were later replaced by the Hong Kong Euro-America China Property Co. Ltd. ("Euro-America China") and by the Guangzhou City Liwan District Construction Company ("Liwan District Construction Co."). Euro-America China was responsible for financing the project, and the residential premises to be completed as part of the project were to be divided between the two parties according to an

387. *Chan*, U.S. Dist. LEXIS 7864, at 2-3. The reported decision in *Chan* is that of the U.S. District Court for the Southern District of New York affirming the decision and order of the bankruptcy court that denied the Official Receiver's motion to hold the attorneys for the two joint venture parties in contempt of previous orders of the bankruptcy court and to sanction them.

388. *Id.* at 3.

389. *Id.* at 4.

390. A People's Court in Guangdong Province, Reported Feb. 9, 1990 [hereinafter "*Liwan District Construction Co.*"], reprinted in Donald J. Lewis & Charles D. Booth, Case Comment, *Liwan District Construction Company v. Euro-America China Property Limited*, 6 CHINA L. & PRAC. 27 (1990) [hereinafter *Liwan District Construction Co. Case Comment*]. Much of the discussion in the text above about *Liwan District Construction Co.* is drawn from the *Liwan District Construction Co. Case Comment*.

agreed upon formula. The agreement also provided for the later conclusion of separate appendices covering the sale of the residential flats in Hong Kong and financing. The parties also agreed to build a temporary office building in Guangzhou (with funds provided by Euro-America China), which was to be transferred to the Liwan District Construction Co. after the project was completed.

While the temporary office building was being constructed, Euro-America China took out advertisements for the sale of the residential flats without first getting the approval of the Liwan District Construction Co. Euro-America China also sold the residential flats in one of the new towns to a Hong Kong party and received HK\$2 million in deposits.

The parties completed the construction of the temporary office building and continued to negotiate the appendices to their agreement. At that point, Euro-America China had paid roughly Rmb 240,000 towards the costs of the office building and the infrastructure and preparation of one of the new towns. The Liwan District Construction Co. had contributed roughly Rmb 90,000 on behalf of Euro-America China. The parties remained unable to agree on the appendices and eventually decided to resolve their differences through litigation in the People's Court.

At this time, the Supreme Court of Hong Kong ordered the winding up of Euro-America China and appointed a liquidator for the company. The People's Court held that although Euro-America China was being wound up, its liquidator lacked authority to represent Euro-America China (in liquidation) in the litigation in the People's Court. Accordingly, the People's Court adjudicated the case pursuant to Chinese law based on the facts that had already been established.

The court found that the agreement was valid and that it had not been implemented because Euro-America China had provided insufficient funds. The court also found that Euro-America China had breached the terms of the agreement by selling the residential premises and receiving deposits without getting the approval of its Chinese partner. Lastly, the court found that the agreement was frustrated by the loss of legal capacity of Euro-America China following its winding up. The People's Court held as follows:

- 1) that the agreement be set aside;
- 2) that the costs of the preparatory works and infrastructure for [one of the new towns] and construction of the temporary office be borne by Euro-America China;

- 3) that the residual value of the temporary office, as determined by the relevant authorities, be awarded to Euro-America China;
- 4) that Euro-America China compensate the [Liwan District Construction Co.] for breach of the agreement;
- 5) that after the accounts above had been set off with each other, the balance attributable to Euro-America China be remitted to and held in an account of the People's Court.³⁹¹

In its decision the People's Court adopted a territoriality approach to resolve cross-border insolvency issues. It is unfortunate that the court skirted the insolvency issues raised by the facts and instead resolved the dispute primarily on the basis of Chinese contract law. Here, I will not focus on the contract issues,³⁹² rather, I will discuss the issues relating to the court's failure to recognize the Hong Kong liquidator.

In many countries, a dispute such as this one would be resolved by having creditors, the foreign debtor, or the foreign liquidator commence a liquidation against the foreign debtor. In the liquidation the court might recognize the foreign liquidation and the appointment of the foreign liquidator and then, after paying the priorities and the claims of secured creditors, order that the proceeds from the sale of local assets should be turned over to the foreign liquidator for distribution in the foreign liquidation proceeding for the benefit of all the debtor's creditors. This approach was followed in the ancillary liquidations (as used in its Hong Kong sense) in *Axona* and *Irish Shipping*.

However, this alternative was not available to the parties before the People's Court, because none of the extant Chinese insolvency legislation provided for the liquidation in China of a company such as Euro-America China. At the time *Liwan District Construction Co.* was decided, the principal bankruptcy legislation consisted of the following: the Law of the People's Republic of China on Enterprise Bankruptcy (Trial Implementation) (the "Chinese Bankruptcy Law"),³⁹³ the Shenyang Municipal Trial Regulations for Dealing With the Insolvency and Closure of Urban Collective Industrial Enterprises; the Regulations on Foreign-Related Companies in the Special Economic Zones of Guangdong Province (the "Guangdong Foreign-

391. *Liwan District Construction Co.*, *supra* note 390, at 28.

392. For a discussion of these issues, *see id.* at 29-30.

393. Law of the People's Republic of China on Enterprise Bankruptcy (Trial Implementation), Standing Committee of the National People's Congress, 12/2/86 [hereinafter the Chinese Bankruptcy Law], reprinted in CCH AUSTRALIA LTD., CHINA LAWS FOR FOREIGN BUSINESS—2 BUSINESS REGULATION, ¶ 13-522, at 16,869 [hereinafter CCH, CHINA LAWS—2 BUSINESS REGULATION].

Related Companies Regulations");³⁹⁴ and the Shenzhen Special Economic Zone Foreign Company Insolvency Regulations (the "Shenzhen Bankruptcy Regulations").³⁹⁵ Because Euro-America China was not a state-owned enterprise, it was not eligible for bankruptcy under the Chinese Bankruptcy Law; and because the company was not a foreign-related company and was not located in the Guangdong Special Economic Zones, it was not eligible for bankruptcy under either the Guangdong Foreign-Related Companies Regulations or the Shenzhen Bankruptcy Regulations. Thus, commencing the insolvency of Euro-America China was not a valid option.

In a domestic insolvency in China under the Chinese Bankruptcy Law, a liquidation panel is established to assume control of the debtor and is entitled to engage in civil litigation³⁹⁶ and to assume or reject executory contracts,³⁹⁷ such as the one in this case. Arguably, the People's Court could have recognized the appointment of the Hong Kong liquidator and enabled him to represent the Hong Kong party in the Chinese litigation and thereby exercise the same right that is available to a liquidation panel under Chinese law.³⁹⁸

The People's Court, however, did not follow this course of action. Rather, it applied a territoriality approach and found that the Hong Kong liquidator lacked the authority to represent the Hong Kong party in the Chinese litigation.³⁹⁹ The court's primary aim appears to have been to protect the Chinese party's interests. This is demon-

394. Regulations on Foreign-Related Companies in the Special Economic Zones of Guangdong Province, Standing Committee of the Guangdong People's Congress, 9/28/86 [hereinafter the Guangdong Foreign-Related Companies Regulations], reprinted in CCH AUSTRALIA LTD., CHINA LAWS FOR FOREIGN BUSINESS—1 SPECIAL ZONES & CITIES, ¶ 70-865, at 82,741 [hereinafter CCH, CHINA LAWS—1 SPECIAL ZONES & CITIES]. These regulations have recently been repealed by the Guangdong Province Company Regulations, 5/14/93, Art. 172, reprinted in CHINA'S NEW COMPANIES—VOL. II: REGIONAL FRAMEWORK, 145, 180 (1993).

395. Shenzhen Special Economic Zone Foreign Company Insolvency Regulations, Standing Committee of the Guangdong People's Congress, 11/29/86 [hereinafter the Shenzhen Bankruptcy Regulations], reprinted in 1 CHINA L. & PRAC. 37 (1987). These regulations have recently been repealed by the Guangdong Province, Company Insolvency Regulations, which were promulgated on June 13, 1993 and became effective on August 1, 1993. 1 CHINA L. & PRAC. 12-13 (1994). See also the Shenzhen Special Economic Zone, Enterprise Insolvency Regulations, which were promulgated on December 18, 1993 and became effective on March 1, 1994, reprinted in 1 CHINA L. & PRAC. 15 (1994).

396. See Chinese Bankruptcy Law, Art. 24, reprinted in CCH, CHINA LAWS—2 BUSINESS REGULATION, *supra* note 393, ¶ 13-522(24), at 16,879.

397. See Chinese Bankruptcy Law, Art. 26, reprinted in CCH, CHINA LAWS—2 BUSINESS REGULATION, *supra* note 393, ¶ 13-522(26), at 16,881.

398. For further analysis of this issue, see *Liwan District Construction Co. Case Comment*, *supra* note 390, at 33-34.

399. *Liwan District Construction Co.*, *supra* note 390, at 28.

strated by the court's holding that Euro-America China was entitled to only the residual value of the temporary office building, after deducting the Liwan District Construction Co.'s claims for costs related to the agreement and for damages for the breach of the agreement. This holding was made even though the building had not yet been transferred to the Liwan District Construction Co. In addition, the court held that the residual value of the building should be determined in accordance with "the rules of the town planning departments,"⁴⁰⁰ which most likely would have been less than market value. In effect, the court gave the Chinese party a "lien" on the proceeds up to the full amount of its costs and damages.

Although the Chinese insolvency enactments noted above were not directly applicable to the facts before the People's Court, certain provisions in the Shenzhen Bankruptcy Regulations and the Guangdong Foreign-Related Companies Regulations then in effect supported the territorial approach taken by the court. More specifically, Article 5 of the Shenzhen Bankruptcy Regulations stated that a bankruptcy declaration made in accordance with the bankruptcy law of a foreign country "shall be of no effect as against the property of the insolvent situated in the Shenzhen Special Economic Zone."⁴⁰¹ In addition, under Article 40 of the Guangdong Foreign-Related Companies Regulations, a foreign liquidator would have been entitled to make suggestions about the disposal of the foreign debtor's assets in the Special Economic Zone.⁴⁰² However, Article 44 of the Guangdong Foreign-Related Companies Regulations might well have prevented the transfer of the foreign debtor's assets, or the proceeds from the transfer of the assets, out of the Special Economic Zone. This is because that article required that the disposal of the assets, which was to "take the form of share transfers or the assignment of rights and interests," was not to be made if the transfer would have had "any adverse effect on the normal production and operation activities of the company."⁴⁰³ Article 41 of that legislation further provided that all such transfers were subject to the approval of the local

400. *Id.*

401. Shenzhen Bankruptcy Regulations, Art. 5, *reprinted in* 1 CHINA L. & PRAC. (1987), *supra* note 395, at 37.

402. Guangdong Foreign-Related Companies Regulations, Art. 40, *reprinted in* CCH, CHINA LAWS—1 SPECIAL ZONES & CITIES, *supra* note 394, ¶ 70-865(40), at 82,765.

403. Guangdong Foreign Companies Regulations, Art. 44, *reprinted in* CCH, CHINA LAWS—1 SPECIAL ZONES & CITIES, *supra* note 394, ¶ 70-865(44), at 82,767.

Municipal People's Government.⁴⁰⁴ It is surprising that the People's Court did not explicitly refer to any of these principles as they clearly supported the approach taken by the court.

China's legislative framework, in general, and insolvency legislation, in particular, are changing so rapidly that it is dangerous to draw too general a conclusion from the decision in *Liwan District Construction Co.* about the Chinese treatment of insolvencies in Hong Kong or elsewhere. In any case, the decision exemplifies the application of the territoriality approach to resolving such matters. It is especially discouraging that the People's Court adopted such a protectionist approach in a case involving the recognition of a Hong Kong liquidation. One would have hoped that the Chinese court would have been more receptive to the claims of a Hong Kong liquidator, given that Hong Kong and China will soon share a common future.

VI. RECOMMENDATIONS OF THE SUB-COMMITTEE ON INSOLVENCY REGARDING THE TRANSNATIONAL ASPECTS OF HONG KONG INSOLVENCY LAW OR RELEVANT TO THE TREATMENT OF HONG KONG INSOLVENCIES BY U.S. COURTS⁴⁰⁵

A. *Recommendations Regarding the Transnational Aspects of Hong Kong Insolvency Law*

The *Consultative Document on Bankruptcy* includes recommendations pertaining to cross-border insolvencies in which a full bankruptcy proceeding occurs in Hong Kong. Three of these recommendations involve foreign currency debts. Firstly, the Sub-Committee on Insolvency proposes the date of the bankruptcy order⁴⁰⁶ as the relevant date for choosing the exchange rate for converting foreign currency debts into Hong Kong dollars for the valuation of dividends.⁴⁰⁷ Current Hong Kong bankruptcy law does not contain a specific provision regulating the conversion of foreign currency debts, but the practice has been to convert as of the date of the receiving order.⁴⁰⁸ It is a good idea to specify in the H.K. Bank-

404. Guangdong Foreign Companies Regulations, Art. 41, reprinted in CCH, CHINA LAWS—1 SPECIAL ZONES & CITIES, *supra* note 394, ¶ 70-865(41), at 82,765.

405. Parts of this section are drawn from Charles D. Booth, *Recent Developments in Hong Kong Bankruptcy Law Reform*, 2 INT'L INSOLVENCY REV. 120 (1993).

406. Under the Sub-Committee on Insolvency's proposals, the current two-step procedure consisting of a receiving order and an adjudication order will be replaced by a one-step process consisting of a bankruptcy order only. See *supra* note 306.

407. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 16.10, at 134.

408. *Id.* § 16.07, at 134.

ruptcy Ordinance the date for converting all foreign currency debts, but that date should not be the date of the bankruptcy order. Rather, the relevant date should be the date that the bankruptcy petition is presented, because this is when the bankruptcy process commences and the non-bankruptcy rights of creditors may be affected. It is on the petition date that the court has the power to stay actions against the debtor or the debtor's property,⁴⁰⁹ as well as to appoint an interim receiver.⁴¹⁰

The *Consultative Document on Bankruptcy* also makes recommendations regarding the date for actually converting foreign currency into Hong Kong dollars.⁴¹¹ Because large amounts of money could be involved, the Sub-Committee on Insolvency wanted to ensure that the trustee and creditors have enough flexibility in dealing with assets in foreign currencies.⁴¹² The Sub-Committee noted that although the trustee's function is not to engage in currency speculation (such as by purchasing foreign currencies from Hong Kong dollar holdings), the trustee might be able to benefit the debtor's estate by delaying the conversion of foreign currency into Hong Kong dollars.⁴¹³ The Sub-Committee therefore made the following sensible proposal:

if a trustee, on taking expert advice, considers that it would be beneficial to the estate to delay the conversion of foreign currency to Hong Kong dollars he should be able to do so but only with the approval of the creditors' committee, or the court in the absence of a creditors' committee."⁴¹⁴

The third proposal regarding foreign currency is to enable the trustee to pay some claims in foreign currency to creditors who hold claims in that currency.⁴¹⁵ The current wording in the *Consultative Document on Bankruptcy* is ambiguous. Most likely, however, the Sub-Committee intended that when paying a claim in foreign currency, the value of the foreign creditor's claim in Hong Kong dollars should be computed using the exchange rate as of the date of the bankruptcy order. For example, assume that a foreign creditor holds a claim of one foreign dollar ("F\$1") that is equivalent to HK\$2 as of the date of the bankruptcy order. If at the time that dividends are

409. See H.K. Bankruptcy Ordinance § 14(1).

410. See *id.* § 13.

411. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, §§ 16.11-12, at 135.

412. *Id.* § 16.11, at 135.

413. *Id.*

414. *Id.* § 16.12, at 135.

415. *Id.* § 16.13, at 135.

paid, F\$1=HK\$4, the trustee should pay the foreign creditor F\$.50. That is the equivalent of HK\$2 at the time of payment. Enabling the trustee to pay foreign claims in foreign currency would benefit the debtor's estate by avoiding the expenses incurred in exchanging foreign currency. Another possible advantage might be the payment of a higher rate of interest for funds held in foreign currency than for funds held in Hong Kong dollar accounts.

Another proposal by the Sub-Committee on Insolvency that will likely have an impact on transnational insolvencies is the recommendation that an additional ground for jurisdiction in bankruptcy should be that the debtor has, will have, or is likely to have, assets in Hong Kong by the time the bankruptcy order is made.⁴¹⁶ I oppose this recommendation, because, as noted above, I believe jurisdiction should be determined at the time the petition is presented.⁴¹⁷

B. *Recommendations Relevant to the Treatment of Hong Kong Insolvencies by U.S. Courts*

There are some proposals in the *Consultative Document on Bankruptcy*, which, although not directly related to cross-border insolvency issues, could nevertheless have the unintended consequence of making it more difficult for Hong Kong bankruptcy trustees to gain assistance from U.S. courts. The proposals at issue are those intended to improve the administration of Hong Kong bankruptcies in the domestic context by increasing the Official Receiver's power. More specifically, the *Consultative Document on Bankruptcy* proposes to adopt a variety of procedures contained in the U.K. Insolvency Act 1986 that will streamline the bankruptcy process and increase the discretion of the Official Receiver. For example, the Official Receiver will be given the discretion to choose whether to serve as trustee and therefore whether to hold the first meeting of creditors.⁴¹⁸ (However, the Official Receiver will have to hold the first meeting of creditors if so requested by not less than one-quarter, in value, of the debtor's creditors.)⁴¹⁹ In any case, the trustee will have to call the first meeting of the creditors' committee within three months of his appointment or

416. *Id.* § 3.12, at 19.

417. *See supra* note 220 and accompanying text.

418. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, §§ 9.07-11, at 62-63. These recommendations are based on § 293 of the U.K. Insolvency Act 1986.

419. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 9.12, at 63. This recommendation is based on § 294 of the U.K. Insolvency Act 1986.

of the establishment of the committee, whichever is later.⁴²⁰ However, subsequent meetings of the committee will no longer have to be held monthly, as is the current practice,⁴²¹ but rather will be required to be held when determined by the trustee or if requested by a member of the creditors' committee or as agreed at a previous meeting of the creditors' committee.⁴²² Another recommendation reduces the quorum for all creditors' meetings to one creditor present or represented.⁴²³

Although good reasons can be put forward for streamlining the current bankruptcy procedures and eliminating unnecessary meetings, the Sub-Committee's recommendations would make it possible for the Official Receiver to ignore the views of minority creditors who wish to hold the first meeting of creditors but are unable to meet the one-quarter in value requirement. (This very objection was raised by a minority of the Sub-Committee on Insolvency.)⁴²⁴ In such cases, the ability of unsecured creditors to participate meaningfully in the process will be adversely affected.

Assume that these new procedures are implemented in Hong Kong bankruptcy law and that the following facts arise:

A bankruptcy order is entered against a Hong Kong debtor and the Official Receiver decides not to hold a first meeting of creditors. A U.S. Creditor *X* participating in the Hong Kong bankruptcy proceeding attempts to gather the support of other creditors to hold a first meeting, but is unable to do so and falls short of the one-quarter in value requirement. Shortly after deciding to serve as trustee, the Official Receiver seeks to have the Hong Kong bankruptcy order recognized in the United States and files a petition under Section 304 of the U.S. Bankruptcy Code. Creditor *X* opposes the granting of relief to the Official Receiver on the grounds that the Hong Kong proceedings were fundamentally unfair.

420. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 10.10, at 71. This recommendation is based on Rule 6.153(2) of the United Kingdom Insolvency Rules 1986 [hereinafter U.K. Insolvency Rules 1986].

421. See H.K. Bankruptcy Ordinance § 24(3).

422. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 10.10, at 71. This recommendation is based on Rule 6.153 of the U.K. Insolvency Rules 1986.

423. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, §§ 9.14-.15, at 64. This recommendation is based on Rule 12.4A of the U.K. Insolvency Rules 1986. This Rule was enacted in England and Wales as part of the Insolvency (Amendment) Rules 1987, S.I. 1987, No. 1919. In Hong Kong, at present, the quorum is three creditors, or all the creditors if there are fewer than three creditors. Meetings of Creditors Rules, Rule 24, 1994, cap. 6 sub. leg. D, Laws of Hong Kong.

424. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, § 9.13, at 63-64.

In my view, Creditor *X*'s argument should fail, since the Official Receiver should be able to demonstrate that other procedures exist under Hong Kong law to protect the interests of creditors.⁴²⁵ However, if this hypothetical case were to be decided by a court that follows the decision in *Interpool, Ltd. v. Certain Freights of M/V Venture Star* ("Interpool"),⁴²⁶ the granting of relief might be denied. In that case, the court refused to assist an Australian compulsory liquidation proceeding because it failed to provide U.S. creditors with similar substantive and procedural protection as is provided in the U.S. Bankruptcy Code. The court primarily based its holding on the following factors: (1) that creditors had not been notified prior to the ratification by the Australian court of an important agreement entered into by the liquidator and one of the debtor's creditors; and (2) that Australian law does not provide for a remedy comparable to the equitable subordination doctrine under U.S. law.⁴²⁷ In discussing the procedural protection available to U.S. creditors, the court also noted the Australian liquidator's failure to meet with creditors to discuss an agreement that the liquidator later entered into with a certain creditor.⁴²⁸ I believe this case was wrongly decided since Australian law provides other procedures to safeguard the interests of creditors;⁴²⁹ however, other U.S. courts might nevertheless adopt its approach. To avoid this possibility, the Official Receiver should hold the first meeting of creditors in any bankruptcy that might need to be recognized abroad.

Other recommendations by the Sub-Committee on Insolvency that potentially affect the recognition of Hong Kong bankruptcies by U.S. courts. These involve one of the proposed grounds for commencing a bankruptcy and some of the proposed jurisdictional criteria. For example, although the Sub-Committee proposes to abolish the notion

425. See, e.g., H.K. Bankruptcy Ordinance § 83 (providing that if any creditor "is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the premises as it thinks just").

426. 102 B.R. 373 (D.N.J. 1988), *appeal dismissed*, 878 F.2d 111 (3rd Cir. 1989).

427. *Id.* at 378-80.

428. *Id.* at 378-79.

429. See Booth, *Recognition of Foreign Bankruptcies*, *supra* note 23, at 200-12. See also Daniel M. Glosband & Christopher T. Katucki, *Current Developments in International Insolvency Law and Practice*, 45 BUS. LAW. 2273, 2277-78 (1990); Daniel M. Glosband & Christopher T. Katucki, *U.S. Court Declines Recognition of Australian Insolvency Proceedings*, 2 INT'L CREDITORS' RTS. AND INSOLVENCY REP. 4, 5 (1990); Michael R. Hughes, *An Australian Perspective on Interpool*, 2 INT'L INSOLVENCY & CREDITORS' RTS. REP. 32, 33-34 (1990); Westbrook, *Theory and Pragmatism in Global Insolvencies*, *supra* note 48, at 474-78.

of "acts of bankruptcy,"⁴³⁰ it desires to maintain as a ground for bankruptcy the debtor's departure from Hong Kong. More particularly, the Sub-Committee proposes the following:

[A] petition may be presented in respect of a debt if at the time the petition is presented a debtor intends to depart or has departed out of Hong Kong knowing that a necessary consequence of his departing would be to defeat or delay his creditors notwithstanding that his absence from Hong Kong had nothing to do with his debts.⁴³¹

As under current law, if the ground for commencing a bankruptcy case is the departure of a debtor from Hong Kong, in all likelihood the Hong Kong bankruptcy proceeding would not be recognized as a foreign proceeding under Section 101(23) of the U.S. Bankruptcy Code, which requires that the debtor's domicile, residence, principal place of business, or principal assets would have to be located in Hong Kong at the commencement of the proceeding.⁴³² Thus, in a case involving a departing debtor, it would be appropriate for the U.S. court to grant ancillary assistance to the primary bankruptcy proceeding, which would most likely be in the jurisdiction where the debtor was domiciled or resident at the commencement of the bankruptcy. Similar problems regarding recognition could also arise regarding Hong Kong cases involving the proposed jurisdictional basis that the debtor has, will have, or is likely to have assets in Hong Kong by the time the bankruptcy order is made.⁴³³ Hong Kong trustees should be aware that they will be unable to obtain cross-border cooperation from U.S. courts in cases in which the jurisdictional connection between the debtor and Hong Kong is too attenuated to comply with the statutory requirements of U.S. law.

VII. CONCLUSION

Over the years, common law principles have developed and have been applied in Hong Kong to matters involving both the recognition of foreign insolvencies and the consequences of recognition. Under Hong Kong law, a foreign trustee or liquidator may claim movable property in Hong Kong that is not subject to prior attachment, execution, or valid charge. Hong Kong law also enables a foreign represen-

430. CONSULTATIVE DOCUMENT ON BANKRUPTCY, *supra* note 15, §§ 2.03-.12, at 7-10.

431. *Id.* § 2.20, at 12-13.

432. 11 U.S.C. § 101(23) (1994). *See supra* note 25.

433. *See supra* note 295. Likewise, difficulties could also arise involving those jurisdictional grounds in § 6(1)(d) of the H.K. Bankruptcy Ordinance and their proposed replacements that may be satisfied before the date of the filing of the bankruptcy petition. *See id.* and accompanying text.

tative to pursue a variety of other non-insolvency options, as well as to commence a liquidation or bankruptcy in Hong Kong. In transnational insolvencies the Hong Kong courts can foster cross-border cooperation under a universality/plurality approach through ancillary insolvencies or other types of concurrent insolvencies.

It would be beneficial for the Sub-Committee on Insolvency to review the transnational aspects of Hong Kong insolvency law as part of its overall review of Hong Kong insolvency law. Although cross-border cooperation is possible at present, even greater cooperation would most likely occur if detailed statutory guidelines were enacted for handling transnational liquidations and bankruptcies. It would be best if these new guidelines were enacted before 1997.

These guidelines should incorporate many of the existing statutory provisions and common law principles, some of which should first be clarified or supplemented. The enactments should include rules for the recognition of foreign insolvencies, jurisdictional requirements, criteria to assist courts in deciding whether to grant ancillary assistance to foreign insolvencies, and examples of the types of assistance that a court may grant.

Special attention should be given to updating and restructuring Part X of the H.K. Companies Ordinance. Some of the obsolete provisions should be repealed and the inconsistency between Section 327(1) and Section 331 should be removed.

To date, Hong Kong representatives have been successful in gaining recognition and assistance from the courts in the United States. However, if the Sub-Committee on Insolvency's recommendations are enacted into law, a few of the proposals could adversely affect the ability of Hong Kong trustees to continue obtaining cooperation from the U.S. courts. Further thought should be given to the recognition of Hong Kong liquidators and trustees by overseas courts. In addition, the bankruptcy and companies legislation should be amended to clarify the extraterritorial effect of Hong Kong insolvencies, particularly with respect to the application of the avoidance powers. Lastly, given the approach of 1997 and the resulting uncertain economic climate in Hong Kong, it is important that Hong Kong and China attempt to resolve cross-border insolvency matters.